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TRANSCRIPT OF RECORD

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Supreme Court of the United States

OCTOBER TERM, 1937

No. 864

LOWE BROTHERS COMPANY, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 14, 1938.

CERTIORARI GRANTED APRIL 11, 1938.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF OHIO.

Lowe Brothers Company, Plaintiff,

vs.

The United States of America, Defendant.

At Law No. 4290.

PETITION—Filed May 24, 1930.

I.

The above named petitioner, Lowe Brothers Company, alleges that it is now, and since June, 1929, has been, a corporation duly organized and existing under and by virtue of the laws of the State of Ohio, having its principal place of business in the City of Dayton, State of Ohio, and that it acquired the claim sued on herein in a merger as hereinafter more specifically set forth.

II.

Petitioner alleges that it was incorporated in June 1929, and on the first day of June, 1929, was party to an indenture by and between the Sherwin-Williams Company, which indenture is set forth as Exhibit "A" and made a part of this petition by reference. Petitioner further alleges that the assets which it received under the agreement and covenants of the indenture were transferred to the Sherwin-Williams Company by the Lowe Brothers Company, a corporation organized and incorporated in 1893. Said indenture between the Lowe Brothers Company (incorporated in 1893) and the Sherwin-Williams Company is hereinafter set forth as Exhibit "B" and made a part of this petition by reference.

III.

Petitioner alleges that its predecessor, the Lowe Brothers Company (incorporated in 1893), under the provisions of the Act of Congress, approved October 3,

1917, entitled "An Act to provide revenue to defray war expenses and for other purposes," otherwise generally known as an amendment to the Revenue Act of 1916, duly filed its income and excess profits tax returns for its fiscal year ended September 30, 1917, on October 31, 1917; under the provisions of the Act of Congress, approved February 24, 1919, entitled "An Act to provide revenue and for other purposes," otherwise generally known as the Revenue Act of 1918, filed income and excess profits tax returns for its fiscal year ended September 30, 1918, on October 31, 1918. On January 28, 1924, the Commissioner of Internal Revenue found an alleged deficiency in tax of $31,771.71 against the petitioner's predecessor for its fiscal year ended September 30, 1917, which additional tax was assessed in May, 1924, more than five years after petitioner's said predecessor had filed its 1917 income and profits tax return. The said Commissioner of Internal Revenue found that the said petitioner's predecessor had overpaid its tax for the fiscal year ended September 30, 1918, in the amount of $52,710.03. Instead of refunding this total amount, the said Commissioner of Internal Revenue erroneously and illegally credited the sum of $11,230.14, representing a part of the overpayment of tax for the fiscal year ended September 30, 1918, against the alleged deficiency tax of $31,771.71 for the fiscal year ended September 30, 1917, and the Collector of Internal Revenue made said credit on April 23, 1924, and the Commissioner of Internal Revenue ratified it on May 10, 1924. Under Section 609 of the Revenue Act of 1928, said credit is wholly void.

IV.

On March 31, 1928, petitioner's predecessor filed a claim for the refund of $40,000.00 for its fiscal year ended September 30, 1917, asserting that said tax was paid after the running of the statute of limitations and on February 1, 1929, the Commissioner of Internal Revenue disallowed said claim for the said $11,230.14 credited as aforesaid.

V.

The claimant avers that it, and its predecessor, is and always has been the sole owner of the claim hereinbefore referred to, and has not assigned or transferred the whole or any part thereof or interest therein; that said corporation and its duly qualified officers have at

all times borne true allegiance to the United States of America, and have not, in any way, voluntarily given encouragement to rebellion against said Government, or aided or abetted in any manner, or given comfort to any sovereign or government that is or ever has been at war with the United States Government.

The defendant, the United States of America, is sued in its sovereign capacity for the reason that Charles M. Dean who was Collector of Internal Revenue for the First District of Ohio in 1924, is no longer in office as Collector, having retired September 15, 1927.

VI.

The Plaintiff further alleges that although the overpayment of $11,230.14 erroneously credited as above alleged, was allowed by the Commissioner of Internal Revenue, no part of said sum of $11,230.14 has been refunded up to the time of bringing this suit, although the Commissioner of Internal Revenue has been repeatedly requested by the plaintiff, and its predecessor, to refund the said sum of $11,230.14, erroneously credited by the Commissioner of Internal Revenue against said additional tax claimed to be due for the fiscal year ended September 30, 1917.

Wherefore, premises considered, the plaintiff aforesaid prays that it have and recover of and from the defendant the sum of $11,230.14, with interest thereon at the rate of six per cent per annum as provided by law.

(Sgd.) John E. Hughes,
(Sgd.) William Cogger,
Counsel for Plaintiff,
844 Earle Building,
Washington, D. C.
(Sgd.) Dolle, O'Donnell & Cash,
Counsel for Plaintiff,
Cincinnati, Ohio.

State of Ohio,)
County of Montgomery.) ss.

Donald A. Kohr, being duly sworn, deposes and says that he is president of the Lowe Brothers Company, the claimant in the above entitled cause; that he has read the above petition and that the matters therein stated are true to the best of his knowledge and belief, except as

to those matters stated to be upon information and belief and those matters he believes to be true.

(Sgd.) Donald A. Kohr.

Subscribed and sworn to before me this 20th day of May, A. D., 1930.

(Sgd.) Carl R. Harlow,
Notary Public.

(Seal)

EXHIBIT "A."

This Indenture Made and entered into on the 1st day of June, 1929 by and between The Sherwin-Williams Company, a corporation duly organized and existing under and by virtue of the laws of the State of Ohio, (Hereinafter called the "Grantor") and The Lowe Brothers Company (incorporated June, 1929) a corporation duly organized and existing under and by virtue of the laws of the State of Ohio (hereinafter called the "Grantee").

Witnesseth That:

Whereas, the Grantor has agreed to convey to the Grantee the property hereinafter described, and the Grantee in consideration thereof has agreed to assume the obligations and liabilities hereinafter described:

Now, Therefore, in consideration of the premises and of the agreements and covenants of the Grantee hereinafter contained the Grantor does hereby grant, convey, release, assign, transfer and set over unto the Grantee all of the following described property, to wit:

All the real estate, tangible personal property, accounts receivable, contract rights, choses in action, shares of stock, Goodwill, business, and other property acquired by the Grantor from The Lowe Brothers Company (incorporated 1893) by virtue of an indenture, warranty

deeds and other instruments dated May 31, 1929, entered into by and between the Grantor and said The Lowe Brothers Company, not including however, the United States Bonds and the cash so acquired, but specifically including any and all profits earned by said business and properties on and after June 1, 1929, and in addition thereto, the sum of $430,875.69 in cash.

To Have And To Hold the same unto The Lowe Brothers Company (incorporated June, 1929) the Grantee herein, and its successors and assigns forever.

The Grantor covenants that it will upon reasonable request made by the Grantee execute and deliver such further instruments and do such further acts as may be necessary or proper to carry out more effectually the purposes of this instrument.

This Indenture further witnesseth that the Grantee in consideration of the foregoing conveyance, and for itself, its successors and assigns, does hereby covenant and agree to and with the Grantor as follows:

1. That the Grantee will and it does hereby assume and undertake to perform and carry out all of the obligations and liabilities of The Lowe Brothers Company (incorporated 1893) existing on May 31, 1929 and arising thereafter in the operation of the properties and business acquired by the Grantor from said The Lowe Brothers Company (incorporated 1893) as hereinabove stated.

2. That the Grantee will and it does hereby assume and agree to pay, as the same shall become due and payable, or at such other times as the Grantee may elect and agree upon with the holders, all of the indebtedness and liabilities of said The Lowe Brothers Company (incorporated 1893) existing on May 31, 1929 and arising thereafter in the operation of said properties and business.

3. That the Grantee shall and will indemnify, protect, defend and save the Grantor free and harmless from any and all liabilities, loss, costs or expense in any way connected with, growing out of, or resulting from any of the liabilities, contracts, obligations and engagements so assumed by the Grantee as above provided.

In Witness Whereof, the Grantor has caused these presents to be executed in its name by its President and its corporate seal to be attached, attested by its Secretary pursuant to authority of its Board of Directors, and

Exhibit A

the Grantee has caused these presents to be executed in its name by its President and its corporate seal to be attached, attested by its Secretary pursuant to authority of its Board of Directors, all in duplicate, as of the day and year first above written.

The Sherwin-Williams Company,
By Geo. A. Martin,
President.

Attest:
H. J. Douglas,
Secretary.

The Lowe Brothers Company,
(Incorporated June 1929)
By Donald A. Kohr,
President,

Attest:
Charles W. Parrott,
Secretary.

Signed, Sealed and Acknowledged
and Delivered in the presence of:
R. A. Bradley,
C. J. Rossow,
David P. Haber,
Milton Wright.

State of Ohio, }
County of Cuyahoga } ss.

On this 8th day of July 1929, before me, A Notary Public in and for said County and State, personally appeared G. A. Martin and H. J. Douglass to me personally known and known to me to be respectively the President and Secretary of The Sherwin-Williams Company, the corporation described in and whose name is signed to the foregoing indenture who acknowledged that the seal affixed to the foregoing indenture is the corporate seal of said corporation; that they did sign and seal the foregoing indenture in the name and on behalf of said corporation by authority of its Board of Directors duly and legally given, and that said indenture is the free act and deed of said The Sherwin-Williams Company, and of themselves individually and as said respective officers.

In Testimony Whereof, I have hereunto set my name and official seal at the City of Cleveland, Ohio, the day and year in this certificate above set forth.

L. H. Schroeder,
Notary Public.

Exhibit A

State of Ohio,)
County of Montgomery) ss.

On this 8th day of July 1929, before me, a Notary Public in and for said County and State, personally appeared Donald A. Kohr and Charles W. Parrott to me personally known and known to me to be respectively the President and Secretary of The Lowe Brothers Company, the corporation described in and whose name is signed to the foregoing indenture who acknowledge that the seal affixed to the foregoing indenture is the corporate seal of said corporation; that they did sign and seal the foregoing indenture in the name and on behalf of said corporation by authority of its Board of Directors duly and legally given, and that said indenture is the free act and deed of said The Lowe Brothers Company, and of themselves individually and as said respective officers.

In Testimony Whereof, I have hereunto set my name and official seal at the City of Dayton, Ohio, the day and year in this certificate above set forth.

David P. Haber,
Notary Public.

EXHIBIT "B."

This Indenture, made and entered into the 31st day of May, 1929, by and between The Lowe Brothers Company, a corporation duly organized and existing under and by virtue of the laws of the State of Ohio, (hereinafter called the "Grantor"), and The Sherwin-Williams Company, a corporation duly organized and existing under and by virtue of the laws of the State of Ohio, (hereinafter called the "Grantee"),

Exhibit B

Witnesseth That:

Whereas, the parties have agreed to merge by the transfer and conveyance to the Grantee of all the property and assets of the Grantor:

Now, Therefore, in consideration of the premises and of the sum of Nine Hundred Thousand Dollars ($900,000.00) in cash, and 36,760 shares of the Preferred Stock of the Grantee, entitled to cumulative dividends at the rate of six (6) per cent, per annum, payable quarterly, and 40,634 shares of the Common stock of the grantee, and of the agreements of the Grantee hereinafter contained, the Grantor does hereby grant, convey, release, assign, transfer and set over unto the Grantee all of the following described property, to wit:

> All of the property, real, personal and mixed, tangible and intangible, of every kind and character whatsoever, and wheresoever situate of the Grantor; subject, however, to all of the outstanding liabilities and obligations of the Grantor.

To Have And To Hold the same unto said The Sherwin-Williams Company, the Grantee herein, and its successors and assigns forever.

The Grantor covenants that it will, upon reasonable request made by the Grantee, execute and deliver such further instruments and do such further acts as may be necessary or proper to carry out more effectually the purposes of this instrument.

This Indenture further witnesseth that the Grantee, as a part of the consideration for the foregoing conveyance, and for itself, its successors and assigns, does hereby covenant and agree to and with the Grantor as follows:

> 1. That the Grantee will and it does hereby assume and agree to pay, as the same shall become due and payable, or at such other time as the Grantee may elect and agree upon with the holders, all of the indebtedness and liabilities of the Grantor of every kind and nature.
>
> 2. That the Grantee will and it does hereby assume and agree to perform and carry out all existing unfulfilled contracts, obligations and engagements of the Grantor in all respects in accordance with the terms and requirements thereof, and as though the Grantor itself had continued in the ownership and operation of its property and business.

Exhibit B

3. That the Grantee shall and will indemnify, protect, defend and save the Grantor free and harmless from any and all liability, loss, cost or expense in any way connected with, growing out of or resulting from any of the indebtedness, liabilities, contracts, obligations and engagements of the Grantor so assumed by the Grantee as above provided.

In Witness Whereof, the Grantor has caused these presents to be executed in its name by its President and its corporate seal to be attached, attested by its Secretary, pursuant to authority of its stockholders and Board of Directors, and the Grantee has caused these presents to be executed in its name by its President and its corporate seal to be attached, attested by its Secretary, pursuant to authority of its Board of Directors, all in duplicate on the day and year first above written.

The Lowe Brothers Company,
By (Signed) Donald A. Kohr,
President.
Attest: (sgd) Charles W. Parrott,
Secretary.
The Sherwin-Williams Company,
By (sgd) Geo. A. Martin,
President.
Attest: (sgd) H. J. Douglas,
Secretary.

Signed, Sealed and Acknowledged
and Delivered in the presence of:
(signed) Joseph L. Lockner,
(signed) George B. Young,
(signed) Thomas F. Patton,
(signed) George B. Young.

State of Ohio }
County of Montgomery } ss.

On this 31st day of May, 1929, before me, a Notary Public in and for said County and State, personally appeared Donald A. Kohr and Charles W. Parrott, to me personally known, and known to me to be respectively the President and Secretary of The Lowe Brothers Company, the corporation described in and whose name is signed to the foregoing indenture, who acknowledged that the seal affixed to the foregoing indenture is the corporate seal of said corporation; that they did sign and seal said indenture in the name and on behalf of said corporation, by authority of its stockholders and Board

of Directors, duly and legally given, and that said indenture is the free act and deed of said The Lowe Brothers Company, and of themselves individually and as said respective officers.

In Testimony Whereof, I have hereunto set my hand and official seal at the City of Dayton, Ohio, the day and year in this certificate above set forth.

(Signed) R. P. Davies,
Notary Public.

My commission expires Sept. 15, 1931.

AFFIDAVIT—Filed May 29, 1930.

James B. O'Donnell, being duly sworn on oath, deposes and says that he served a copy of the Petition in the above and foregoing case on the Attorney General of the United States by mailing a copy thereof this day, May 24, 1930, by registered mail, as follows:

"Attorney General of the United States,
Washington, D. C."

James B. O'Donnell.

Subscribed and sworn to before me this 24th day of May, A. D. 1930.

John R. Hahn,
Notary Public in and for Hamilton
County, Ohio.

(Seal)

ANSWER—Filed Aug. 21, 1930.

Now comes the defendant, the United States of America, by Haveth E. Mau, United States Attorney for the Southern District of Ohio, and by way of answer to the matters and things alleged in the petition filed in this cause, says:

I.

That the allegations of first section of the petition are admitted.

II.

That the allegations of second section of the petition are admitted.

III.

That answering the matters and things alleged in the third section of the petition, it is admitted that the Lowe Brothers Company (incorporated in 1893) duly filed its income and excess profits tax return for the fiscal year ending September 30, 1917, on October 31, 1917; and that the said corporation filed its income and excess profits tax return for the fiscal year ending September 30, 1918, on October 31, 1918. It is further admitted that on January 28, 1924, the Commissioner of Internal Revenue found an alleged deficiency in tax to the amount of $31,771.71 against the said petitioner's predecessor as aforesaid, for the fiscal year ending September 30, 1917, but denies that said additional tax was assessed in May, 1924, alleging instead that said assessment was made in March, 1924. It is also admitted that the Commissioner of Internal Revenue found that the said petitioner's predecessor had overpaid its tax for the fiscal year ending September 30, 1918 to the amount of $52,710.13, and that $11,230.14 of the said overpayment was credited against the deficiency tax of $31,771.71 for the said fiscal year ending September 30, 1917, but denies that said credit was made on April 23, 1924, alleging that said credit was made March 15, 1924. By way of further answer and explanation, the defendant says that while admitting the said Lowe Brothers Company (incorporated in 1893) did file its income and excess profits tax return for the period ending September 30, 1917, on October 31, 1917, the defendant alleges that the same was inaccurate, incorrect and false in that it did not disclose the true profits and income of said corporation nor show its true tax liability as required by law; whereupon, it became necessary for the Commissioner of Internal Revenue to investigate the

books and affiairs of said corporation in order to arrive at the true facts, and that as a result thereof said deficiency tax was assessed as aforesaid to the amount of $31,771.71. All other matters and things not specifically admitted in said section are denied.

IV.

That answering the matters and things set out in Section four of the petition, defendant admits that petitioner's predecessor filed a claim for refund as alleged; and that the Commissioner of Internal Revenue disallowed said claim for the sum of $11,230.14 credited as aforesaid on said deficiency tax assessed for the period ending September 30, 1917; and in explanation thereof defendant says that said taxpayer having filed its income and excess profits tax return on October 31, 1917 for the period ending September 30, 1917, ordinarily it is true that the statutory period for assessment and collection would have expired within five years from the date of said return; but defendant alleges that the said taxpayer, petitioner's predecessor, executed and filed on the 25th of January, 1923, through its properly accredited officials, a tax waiver also signed by D. H. Blair, Commissioner of Internal Revenue, in words and form as follows:

Jan. 25, 1923.

'INCOME AND PROFIT TAX WAIVER.'

In pursuance of the provisions of subdivision (d) of Section 250 of the Revenue Act of 1921 ———— of Ohio and the Commissioner of Internal Revenue, hereby consent to a determination, assessment, and collection of the amount of income, excess profit, or war profits taxes due under and return made by or on behalf of the said Corporation for the fiscal years 1917—under the Revenue Act of 1921, or under prior income, excess-profit, or war-profits tax Acts, or under Section 38 of the Act entitled 'An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes,' approved August 5, 1909, irrespective of any period of limitations.

(s) The Lowe Bros. Co.,
Taxpayer.
By (s) F. B. Currigan,
Treasurer.
(s) D. H. Blair,
Commissioner. CMJ."

Answer

That thereafter on February 9, 1923 petitioner's predecessor through its properly accredited officials executed and filed a tax waiver duly signed by D. H. Blair, Commissioner of Internal Revenue, in words and form as follows:

"February 9, 1923.
(Date)

INCOME AND PROFIT TAX WAIVER.

"In pursuance of the provisions of subdivision (d) of Section 250 of the Revenue Act of 1921 The Lowe Bros. Co. of Dayton, Ohio, and the Commissioner of Internal Revenue, hereby consent to a determination, assessment, and collection of the amount of income, excess profit, or war profits taxes due under and return made by or on behalf of the said The Lowe Brothers Co. for the years 1917 under the Revenue Act of 1921, or under prior income, excess-profit, or war-profits tax Acts, or under Section 38 of the act entitled 'An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes,'' approved August 5, 1909, irrespective of any period of limitations.

(s) The Lowe Bros. Co.,
Taxpayer.
By (s) F. B. Currigan,
Treasurer.
Approved Feb. 20, 1923.
(s) D. H. Blair,
Commissioner of Internal Revenue."

That said tax waivers extended the statutory period to such extent that said assessment and application of payment thereon was made within due time and within the period allowed by law; and that the Commissioner of Internal Revenue in rejecting said claim for refund was within his rights and acting in accordance with law. All said matters above set forth are hereby pleaded as matters of defense to this action.

V.

That the allegations of fifth section of the petition are admitted.

Answer

VI.

That answering the matters and things set out in the sixth section of the petition, the defendant denies that the overpayment of $11,230.14 was erroneously credited as alleged and admits that no part of said sum has been refunded. It is also admitted that the claim for refund was rejected by the Commissioner of Internal Revenue being justified therein by reason of the things set out and explained in Section Four of this answer.

Wherefore, defendant prays that the petitioner recover nothing by reason of this action; that the action be dismissed; and that the defendant go without day and recover of the petitioner its costs.

Haveth E. Mau,
United States Attorney, S. D. O.,
Attorney for the defendant.

State of Ohio }
Hamilton County } ss.

Frank Hier, being duly sworn deposes and says that he is the duly appointed, qualified, and acting Assistant United States Attorney for the Southern District of Ohio, and as such is attorney for defendant in this action; that he is authorized to make and does make affidavit on behalf of defendant; that he has read the foregoing Answer and of his own knowledge knows the same to be true, except as to matters and things stated on information and belief, and as to these he believes it to be true.

Frank Hier,
Assistant U. S. Attorney.

Sworn to before me and subscribed in my presence this 20 day of August, A. D. 1930.

James P. Unger,
Notary Public, in and for Hamilton County, Ohio.

(Seal)

REPLY—Filed Jan. 30, 1933.

Comes again the petitioner and in reply to the answer of the defendant, says:

III.

Replying to new matters and things alleged in Section 3 of the Answer, petitioner denies that the credit referred to in this section was made March 15, 1924 and denies all other allegations therein contained, except those specifically admitted or alleged in the petition or in this reply.

IV.

Replying to new matters and things alleged in Section 4 of the answer, petitioner admits that the statutory period for assessment and collection expired within five years from the date of the return of the petitioner made in October 1917; and while admitting the execution of the waivers set out in said Section 4, denies the statement that said waivers extended said statutory period to such an extent that said assessment and application of payment thereon was made within due time and within the period allowed by law, and denies the further statement that the Commissioner of Internal Revenue in rejecting petitioner's claim for refund was within his rights and acting in accordance with law.

VI.

Replying to new matter and things alleged in Section 6 of the answer, petitioner denies that the Commissioner of Internal Revenue was justified in the rejection of petitioner's claim for refund.

Wherefore, petitioner prays as it did in its petition.

Dolle, O'Donnell and Cash,
Counsel for Plaintiff,
Cincinnati, Ohio.

State of Ohio }
County of Hamilton } ss.

James B. O'Donnell, being duly sworn, deposes and says that he is one of the attorneys for the petitioner in this cause; that he is authorized to make and does make affidavit on behalf of petitioner; that he has read the above reply and that the matters stated therein are true to the best of his knowledge and belief, except as to

matters stated to be upon information and belief and those he believes to be true.

James B. O'Donnell.

Subscribed and sworn to before me this 30th day of January, 1933.

Alberta Wood,
Notary Public in and for Hamilton County, Ohio.

(Seal)

STIPULATION WAIVING A JURY—Filed Sept. 15, 1932.

It is hereby agreed between the parties by the respective counsel that this case be tried by the Court without the intervention of a jury.

(Signed) Nevin,
Judge, U. S. District Court, S. D. O.

Approved—
James B. O'Donnell,
John E. Hughes,
Counsel for Plaintiff.
Haveth E. Mau,
Counsel for Defendant.

STIPULATION OF FACTS—Filed Jan. 30, 1933.

It is hereby stipulated between the parties, both plaintiff and defendant, by their respective attorneys of record, that the following facts shall be taken as true for the purposes of the trial of the case, and the court is requested to make its findings of fact in accordance therewith, it being understood and agreed that either party may introduce further and additional evidence in reference to the matters herein stipulated, but not in contradiction thereof.

I.

1. Lowe Brothers Company is a corporation duly organized and existing under the laws of the State of Ohio having its principal place of business in the City of Dayton, State of Ohio, and was incorporated in June, 1929.

II.

2. Lowe Brothers Company (incorporated in 1893) predecessor of the petitioner, filed its income and profits tax return for its fiscal year ended September 30, 1917, on October 31, 1917, with the proper Collector of Internal Revenue and paid the tax shown due thereon; the predecessor of petitioner filed its income and excess profits tax return for the fiscal year ended September 30, 1918, on October 31, 1918, with the proper Collector of Internal Revenue and paid the tax shown due thereon.

III.

3. On March 15, 1924, the Commissioner of Internal Revenue duly assessed against Lowe Brothers Company (incorporated in 1893) an additional income and profits tax for the fiscal year 1917, amounting to $31,771.71.

IV.

4. On March 15, 1924, the Commissioner of Internal Revenue signed a schedule of overassessments indicating that the petitioner's predecessor had overpaid its income and profits tax for the fiscal year ended September 30, 1918, in the amount of $52,710.03. Of said amount the Collector of Internal Revenue, under instructions from the Commissioner, credited the sum of $11,230.14 against the deficiency assessment of $31,771.71 for the fiscal year ended September 30, 1917. The Collector of Internal Revenue applied the said credit on April 24, 1924, and the Commissioner approved said credit by signing

Schedule IT R 9664 on May 10, 1924. (Certified photostate copies of the Schedule of Overassessments, No. IT A 9664, and of the Schedule of Refunds and Credits, No. IT R 9664, are hereby made a part of this stipulation as Exhibit A.)

V.

5. On April 2, 1928, the petitioner's predecessor filed a claim for refund for $40,000.00 for its fiscal year ended September 30, 1917. (a photostat copy of which is hereto attached, made a part of this stipulation, and marked Exhibit B.) On February 1, 1929, the Commissioner of Internal Revenue gave formal notice of rejection of said claim.

VI.

6. On January 25, 1923, and on February 9, 1923, respectively, the petitioner's predecessor filed income and profits tax waivers, approved by the Commissioner of Internal Revenue, for the fiscal year ended September 30, 1917. (Photostat copies of these waivers are attached hereto, made a part of this stipulation, and marked Exhibits C and D respectively.)

John E. Hughes,
Attorney for Petitioner.
Haveth E. Mau,
Attorney for Defendant.

By agreement of Counsel, the letter of Jan. 29, 1929, hereto attached marked Exhibit A2 is to be considered as part of the Stipulation above.

James B. O'Donnell,
Atty. for Pltff.
W. F. Evans,
For Defendt.

Jan. 30, 1933.

EXHIBIT A.

UNITED STATES (EMBLEM) OF AMERICA

General Accounting Office.

Pursuant to the Act of June 10, 1921, 42 Stat. 24, I hereby certify that the annexed documents, numbered P-1 and P-2, are true copies of the official documents now on file in the General Accounting Office in the following case:

Lowe Brothers Company v. United States.

In Witness Whereof, I have hereunto set my hand and caused the seal of the General Accounting Office to be affixed this 13th day of November, in the year 1930, at Washington.

J. Lee Carr,
Comptroller General of the United States.

Exhibit A

TREASURY DEPARTMENT
U. S. Internal Revenue Service
Form 7805
Form approved by Comptroller General
Feb. 5, 1923

IMMEDIATE
This schedule must be executed and all required steps taken without delay.
Commissioner of Internal Revenue.

SCHEDULE OF OVERASSESSMENTS

AND

Allowance of Abatements, Credits, Refunds, and Related Claims, If Any

INCOME TAX UNIT

ORIGINAL
Voucher to General Accounting Office
FIRST *District of* OHIO
(Stamp)
RECEIVED
Mar 24 1924
Collector Internal Rev.
First Dist. Ohio

C-16509

Schedule No. IT-A-9664

Sheet 1 of.....sheets

AUTHORIZATION OF COMMISSIONER

To the Collector FIRST District of OHIO

The amounts listed in column 4 as overassessments (or reductions of tax liability) are hereby approved, and the related claims, if any, allowed in the respective amounts indicated by the "Certificates of Overassessment" or "Notices of Adjustment of Refund" attached thereto.

You will immediately check such items against the accounts of the several taxpayers, and determine whether the amounts in which the tax liabilities have been reduced should be respectively abated, in whole or in part, and make such abatements as may be warranted by the conditions of the taxpayers' accounts for the years involved.

If any part of any such item is found to be an overpayment, you will examine all accounts of the taxpayer for other periods and apply the overpayment as a credit against the taxes due, if any, making the appropriate entries in your accounts. (This applies only to income, war profits, and excess profits taxes.) Such credits will be entered in column 9, and placed in column 5 of a subsidiary Schedule of Refunds and Credits (Form 7805-A).

The balance, if any, of the overpayment will be entered in column 12, and placed in column 4 of the subsidiary schedule (Form 7805-A) referred to above, and an appropriate memorandum made upon the taxpayer's account.

You will thereupon complete and certify this schedule and the schedule upon Form 7805-A, and return the necessary copies of each to the Commissioner of Internal Revenue.

Date MAR 15 1924

D. H. Blair,
Commissioner of Internal Revenue.

CERTIFICATE OF DEPUTY COMMISSIONER

Commissioner of Internal Revenue:

The returns of the taxpayers listed herein, together with their claims (if any) and appropriate supporting evidence, have been carefully examined and the tax liability of the respective taxpayers has been determined in accordance with the available facts and the law. The overassessments or reductions in tax liability appearing in column 4 are accordingly recommended for allowance.

Date MAR 15 1924

J. G. Bright,
Deputy Commissioner.

CERTIFICATE OF COLLECTOR

To the Commissioner of Internal Revenue:

The items in this schedule have been checked against the accounts of the respective taxpayers concerned and the amounts indicated have been applied as abatements and credits on their accounts.

The amounts of overpayment and the net amounts refundable have been determined to be as indicated herein.

Date 4/24/24

Collector 1st District of Ohio

Chas. M. (illegible)

ACCOUNTS UNIT

Noted and entered

Initials	Date
T	5/29/24

Item No. (1)	Certificate of Overassessment or Claim Number (2)	Name and Address of Taxpayer (3)	Overassessments or Reductions of Tax Liability (Amount) (4)	List, Page and Line, or Account Number (5)	Taxable Year. (6)	(Entries to be made by the Collector) Abatement (Amount) (7)	Overpayment (Amount) (8)	Credit (Amount carried to (Form 7805-A) (9)	Account Credited; List, Page and Line (10)	Due Date of Items Against Which Credit Was Made (11)	Net Amount Refundable Carried to Form 7805-A (12)	Remarks (13)
3	72711	Lowe Brothers Co.	52710.03		9/30/18	32448.98	20261.05	(8000.00	12/400503-12/21 L			Yr. 9/30/21
								(149.98	5/400502-5/22 L 5/10/22			Yr. 368 M
								(880.93	3/02–3/24 Sp. #10CL 4/27/24 yr. 9/30/16			Addtl. assess.
								(11230.14	3/02–3/24 Sp. #10CL 4/27/24 yr.9/30/17			will follow

TREASURY DEPARTMENT
U. S. Internal Revenue Service
Form 7805-A
Form approved by Comptroller General
Feb. 5, 1923

IMMEDIATE
This schedule must be executed and all required steps taken without delay.
Commissioner of Internal Revenue.

SCHEDULE OF REFUNDS AND CREDITS

ORIGINAL
Voucher to General Accounting Office

Illegal Or Erroneous Collections
INCOME TAX UNIT

Schedule No. IT-R-9664
Sheet 1 of 1 *Sheets.*
1st *Dist. of* OHIO
D. C. Voucher No......

22865

CERTIFICATE OF COLLECTOR

To the Commissioner of Internal Revenue:

The items hereon are relisted as they appeared for refund or credit on an original schedule (bearing the same number) of overassessments and related claims, if any, heretofore approved and allowed by the Commissioner of Internal Revenue. An examination of the accounts of the several taxpayers named disclosed such items to be the portions of such previously allowed overassessments or reductions of tax liability subject to refund or credit.

Date 4/24/24

Chas. M. (illegible)
Collector, 1st District of Ohio

CERTIFICATE OF DEPUTY COMMISSIONER

Commissioner of Internal Revenue:

The items listed in column 4 hereof have been found to be the refundable portions of overassessments heretofore allowed, and the accrued interest, if any, listed in column 6 has been found due.

Date MAY 10 1924

J. G. Bright
Deputy Commissioner.

AUTHORIZATION OF COMMISSIONER

To the Disbursing Clerk, Treasury Department:

The items listed in column 4 hereof have been found to be the refundable portions of overassessments heretofore allowed, and the accrued interest, if any, listed in column 6 has been found due. Payment may, therefore, be made in the amounts shown in column 7.

Date MAY 10 1924

C. R. Nash
Acting Commissioner of Internal Revenue

Unit	Notations	Date
A & C	Cl	5/19/24

Item No.	Certificate of Overassessment or Claim Number	Name and Address of Taxpayer	Net Amount Refundable	Amount Credited	(Not to be used by Collector) Interest Accrued	(Not to be used by Collector) Total Refundable	Date of Final Payments of Accounts from which Credits were Transferred and Overpayments Found	(Not to be used by Collector) Refunding Taxes Illegally Collected: 1924 and Prior Years	19....	19....	Paid by Disbursing Clerk, Treas. Dept., by Checks Dated May 23 1924 Numbered as follows:	Remarks
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)	(12)	(13)
3	72711	LOWE BROTHERS CO., The		(880.93 (11230.14			12/6/19					

EXHIBIT A-2.

UNITED STATES (EMBLEM) OF AMERICA

Treasury Department

Washington

July 7, 1930.

Pursuant to the provisions of Section 661, Chapter 17, Title 28 of the United States Code (Section 882 of the Revised Statutes of the United States), I hereby certify that the annexed is a true copy of copy of letter dated January (ineligible), 1929, to Lowe Brothers Company, Dayton, Ohio, from C. B. Allen, Deputy Commissioner on file in this Department.

In Witness Whereof, I have hereunto set my hand, and caused the seal of the Treasury Department to be affixed, on the day and year first above written.

By direction of the Secretary of the Treasury:

F. A. Birgfeld,

(Seal) Chief Clerk, Treasury Department.

Jan. 29, 1929.

IT:C
WAM
Lowe Brothers Company,
Dayton, Ohio.

Sirs:

Reference is made to your claim for refund of $11,230.14, Federal income and profits taxes for the fiscal year ended September 30, 1918.

The claim is based upon the statement that an overpayment of tax for the taxable year was credited to an outlawed outstanding tax for the fiscal year ended September 30, 1917 and the statutory period of limitations had run on the collection and crediting of this tax.

An examination of the case discloses that your return for 1917 was filed on October 31, 1917. The unlimited waivers on the assessment and collection filed on January 25, 1923 and February 9, 1923 extended the statutory period for collection to April 1, 1924. The credit of $11,230.14, representing an overpayment of tax for the fiscal year ended September 30, 1918, was applied against the additional tax of $31,771.77 assessed on the March 1924 List, which was signed by the Commissioner on March 15, 1924. Inasmuch as credit was applied within the statutory period for collecting the tax, such credit is valid.

Exhibit A-2

In view of the foregoing, your claim will be rejected in full.

Your claim for refund of $40,000.00 covering the fiscal years ended September 30, 1917 and September 30, 1918 will also be rejected for the portion pertaining to the fiscal year ended September 30, 1918 for the reasons stated above.

The rejections will officially appear on the next schedule to be approved by the Commissioner.

Respectfully,
C. B. Allen,
Deputy Commissioner.
By (Signed) Charles P. Soman,
Head of Division.

SDG-2
(Stamp)
Rejected
13911
I. T. Schedule

PLAINTIFF'S EXHIBIT A-3.

UNITED STATES (EMBLEM) OF AMERICA

Treasury Department
Washington

July 7, 1930.

Pursuant to the provisions of Section 661, Chapter 17, Title 28 of the United States Code (Section 882 of the Revised Statutes of the United States), I hereby certify that the annexed is a true copy of Claim for Refund of (ineligible), income tax for the period from October 1, 1916, to September 30, (ineligible) with Exhibit A attached), filed by Lowe Brothers Company, Dayton, Ohio on file in this Department.

In Witness Whereof, I have hereunto set my hand, and caused the seal of the Treasury Department to be affixed, on the day and year first above written.

By direction of the Secretary of the Treasury:

F. A. Birgfeld,
Chief Clerk, Treasury Department.

Plaintiff's Exhibit A-3

(EXECUTE SEPARATE FORM FOR EACH TAX PERIOD)

TREASURY DEPARTMENT
Internal Revenue Service
Form 843—Jan., 1922
Comptroller General U. S.
January 18, 1922

IMPORTANT
File with Collector of Internal Revenue where assessment was made. Not acceptable unless completely filled in.

CLAIM FOR

- ☐ ABATEMENT OF TAX ASSESSED
- ☐ CREDIT AGAINST OUTSTANDING ASSESSMENTS
- ☒ REFUND OF TAXES ILLEGALLY COLLECTED
- ☐ REFUND OF AMOUNTS PAID FOR STAMPS USED IN ERROR OR EXCESS

NOTICE TO COLLECTOR
Collector must indicate in block above the kind of claim, except in Income Tax cases.

Date received by Administrative Unit
(Stamp)
RECEIVED
May 23 1928
CLAIMS CONTROL SECTION
Stamp here

COLLECTOR'S NOTATION
District
1st Ohio
Account number
Mch-01-#10
Mch 02-#10-1924 Cl
Date received
(Stamp)
RECEIVED
Collector of Internal Revenue
for District of Ohio
May 15 1928
CINCINNATI OFFICE
Stamp here
Collector of Internal Revenue

State of Ohio
County of Montgomery } *ss:*

2049772

TYPE OR PRINT

Lowe Bros Company
(Name of taxpayer or purchaser of stamps.)

(Residence—give street and number as well as city or town and State.)

Dayton Ohio
(Business address.)

1 Ohio
Fisc 9-30-1917-18

This deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference to said statement are true and complete:

Period	Year
From: Oct. 1,	1916
To: Sept. 30,	1918

1. Business in which engaged.....
2. Character of assessment or tax.....
(State for or upon what the tax was assessed or the stamps affixed.)
3. Amount of assessment or stamps purchased..... $.....
4. Reduction of Tax Liability requested (Income and Profits Tax)..... $ 40,000.00
5. Amount to be abated..... $.....
6. Amount to be refunded (or such greater amount as is legally refundable)..... $ 40,000.00
7. Dates of payment (see Collector's receipts or indorsements of canceled checks) May 2, 1924
(If statement covers income tax liability, items 8-11, inclusive, must be answered.)
8. District in which return (if any) was filed.....
9. District in which unpaid assessment appears.....
10. Amount of overpayment claimed as credit..... $.....
11. Unpaid assessment against which credit is asked; period from . . ..to..... $.....

Deponent verily believes that this application should be allowed for the following reasons:

For the reasons set forth on the paper affixed hereto and made by specific reference a part of this Claim and marked Exhibit "A."

Rej 13911

(Attach additional sheets if necessary.)

Sworn to and subscribed before me this 7 day of May, 1928.
David P. Haber
Notary Public.
(Title.)

(Seal)

Signed:
Lowe Brothers Company
By *Frank B. Currigan*
Treasurer.

(This affidavit may be sworn to before a Deputy Collector of Internal Revenue or Revenue Agent without charge.)

CERTIFICATES

Schedule No. .....

I certify that an examination of the records of the Bureau of Internal Revenue shows the following facts as to the assessment and payment of the tax:

Name of Taxpayer.	Character of assessment and period covered.	List.	Year.	Month.	Page.	Line.	Amount.	Date paid.	District in which paid.
.....	.....	.....	.....	.....	.....	.....	$.....	.....	.....
.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
.....	.....	.....	.....	.....	.....	.....	.....	.....	.....

.....
Collector of Internal Revenue.

.....
Assessment Clerk, Commissioner's Office.

Claim No. .....

I certify that the records of my office show the following facts as to the purchase of stamps:

To whom sold or issued.	Kind.	Number.	Denomination.	Date of sale or issue.	Amount.	If special tax stamp, state:	
						Serial number.	Period commencing
.....		.....	.....	.....	$.....	.....	.....
.....		.....	.....	.....	.....	.....	.....
.....		.....	.....	.....	.....	.....	.....
.....		.....	.....	.....	.....	.....	.....
.....		.....	.....	.....	.....	.....	.....

.....
Collector.....District.....

Claim No. .....

Schedule No. .....

(Stamp)
REJECTED
13911
I T SCHEDULE

Adjusted under
cert #2042677

Schedule No. ..... District.....

Allowed or Rejected Number..... .....
(Nature of tax.)

Claimant..... . . ..

Address . . ..

Examined and submitted for action....., 19....

Claim examined by—
.....
Claim approved by—
.....
Chief of Division.

COMMITTEE ON CLAIMS

Amount claimed.. $..... .....

Amount allowed.. $..... .....

Amount rejected.. $(illegible) .....

EXHIBIT "A."

Reference is made to the deficiency for the fiscal year ended September 30, 1917, in the amount of $31,771.77 as assessed against the above named taxpayer in March, 1924. Reference is also made to the allowance of $52,710.03 allowed as an overpayment for the fiscal year ended September 30, 1918. This allowance as shown on schedule No. 9664 was partly credited in the amount of $11,230.14 against the deficiency assessed for the year ended September 30, 1917, as heretofore mentioned. The balance of the deficiency for 1917 in the amount of $20,541.63, was paid by the petitioner May 2, 1924. The balance of the deficiency, to wit, $11,230.14, as previously stated was allowed as a credit to the 1918 allowance as shown on schedule No. 9664. It is believed that this allowance was credited subsequent to April 1, 1924, and prior to June 2, 1924.

It is respectfully submitted on behalf of the above mentioned taxpayer, that at the time $11,230.14 of the overpayment for 1918 was credited against a portion of the deficiency for 1917, that the statute of limitations had run against the collection of this deficiency. It is also submitted that at the time of the payment of the balance of the deficiency in the amount of $20,541.63, this payment being made May 2, 1924, the statute of limitations as to the collection of this deficiency had run against the Government.

In conclusion we respectfully request that a portion of the 1918 overpayment in the amount of $11,230.14 be refunded to the taxpayer, and that the amount of $20,541.63 as paid on May 2, 1924, be likewise refunded to the taxpayer.

In brief, it is contended by the taxpayer that at the time the deficiency for 1917 was paid either by credit or by cash, the statute of limitations as set forth in Section 250 of the Revenue Act of 1921 had run against the collection of the deficiency.

The taxpayer also contends that its income was overstated and its invested capital understated, by reason of which there was assessed and collected against it an excessive and illegal tax.

Exhibit B

EXHIBIT "B."

(EXECUTE SEPARATE FORM FOR EACH TAX PERIOD)

TREASURY DEPARTMENT
Internal Revenue Service
Form 64$—Jan., 1922
Comptroller General U. S.
January 18, 1922

IMPORTANT
File with Collector of Internal Revenue where assessment was made. Not acceptable unless completely filled in.

CLAIM FOR

☐ ABATEMENT OF TAX ASSESSED

☐ CREDIT AGAINST OUTSTANDING ASSESSMENTS

☒ REFUND OF TAXES ILLEGALLY COLLECTED

☐ REFUND OF AMOUNTS PAID FOR STAMPS USED IN ERROR OR EXCESS

COLLECTOR'S NOTATION
District 1st Ohio
Account number Mch 02-Spl 10-1924 CL
Date received (Stamp) RECEIVED Collector of Internal Revenue for District of Ohio Apr 2 1928 CINCINNATI OFFICE Stamp here
Collector of Internal Revenue

Date received by Administrative Unit (Stamp) RECEIVED Apr 5 1928 CLAIMS CONTROL SECTION Stamp here

NOTICE TO COLLECTOR
Collector must indicate in block above the kind of claim, except in Income Tax cases.

State of Ohio
County of Montgomery } *ss:*

2042677

TYPE OR PRINT

Lowe Bros Company
(Name of taxpayer or purchaser of stamps.)

.....
(Residence—give street and number as well as city or town and State.)

Dayton Ohio
(Business address.)

Fisc 9-30-1917
1 Ohio

This deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference to said statement are true and complete:

Period		Year
From: October	1	1916
To. September	30	1917

1. Business in which engaged.....
2. Character of assessment or tax.....
(State for or upon what the tax was assessed or the stamps affixed.)
3. Amount of assessment or stamps purchased..... $.....
4. Reduction of Tax Liability requested (Income and Profits Tax)..... $ 40,000.00
5. Amount to be abated..... $.....
6. Amount to be refunded (or such greater amount as is legally refundable)..... $ 40,000.00
7. Dates of payment (see Collector's receipts or indorsements of canceled checks) May 2, 1924
(If statement covers income tax liability, items 8-11, inclusive, must be answered.)
8. District in which return (if any) was filed.....
9. District in which unpaid assessment appears.....
10. Amount of overpayment claimed as credit..... $.....
11. Unpaid assessment against which credit is asked; period from .....to..... $.....

Deponent verily believes that this application should be allowed for the following reasons:

That the above amount of tax was paid after the running of the statute of limitations and the Collector of Internal Revenue had no authority to demand payment of the tax.

(Attach additional sheets if necessary.)

Sworn to and subscribed before me this 31 day of March, 1928
David P. Haber
Notary Public.
(Title.)

(Seal)

Signed:
Lowe Brothers Company
By *Frank B. Currigan*
Treasurer.

(This affidavit may be sworn to before a Deputy Collector of Internal Revenue or Revenue Agent without charge.)

CERTIFICATES

Schedule No. .....

I certify that an examination of the records of the Bureau of Internal Revenue shows the following facts as to the assessment and payment of the tax:

Name of Taxpayer.	Character of assessment and period covered.	List.	Year.	Month.	Page.	Line.	Amount.	Date paid.	District in which paid.
							$		

.....
Collector of Internal Revenue.

.....
Assessment Clerk, Commissioner's Office.

Claim No. .....

I certify that the records of my office show the following facts as to the purchase of stamps:

To whom sold or issued.	Kind.	Number.	Denomination.	Date of sale or issue.	Amount.	If special tax stamp, state:	
						Serial number.	Period commencing
					$		

Claim No. .....

.....
Collector.....District.....

Schedule No. .....

Adjusted under
cert #2042677

Schedule No. ..... District.....

Allowed or Rejected Number.....

.....
(Nature of tax.)

Claimant.....

Address .....

Examined and submitted for action....., 19....

Claim examined by—
.....
Claim approved by—
.....
Chief of Division.

COMMITTEE ON CLAIMS

Amount claimed.. $..... .....

Amount allowed.. $..... .....

Amount rejected.. $..... .....

EXHIBIT "C."

20751894
Jan. 25, 1923.
Date

INCOME AND PROFIT TAX WAIVER.

In pursuance of the provisions of subdivision (d) of Section 250 of the Revenue Act of 1921.....of Ohio and the Commissioner of Internal Revenue, hereby consent to a determination, assessment, and collection of the amount of income, excess profit, or war profits taxes due under and return made by or on behalf of the said Corporation for the fiscal year 1917 under the Revenue Act of 1921, or under prior income, excess-profit, or war-profits tax Acts, or under Section 38 of the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, irrespective of any period of limitations.

The Lowe Bros. Co.
Taxpayer.
By F. B. Carrigan,
Treasurer.

D. H. Blair,
Commissioner.
C. M. J.

(Seal)
Abstract for 1915 outstanding.
Stamp for Ohio.

EXHIBIT "D."

Distribution Center
Feb. 13, 1923
Con. Ret. Subdivision.
February 9, 1923.
Date

INCOME AND PROFIT TAX WAIVER.

In pursuance of the provisions of subdivision (d) of Section 250 of the Revenue Act of 1921 The Lowe Bros. Co. of Dayton, Ohio, and the Commissioner of Internal Revenue, hereby consent to a determination, assessment, and collection of the amount of income, excess profit, or war profits taxes due under and return made by or on behalf of the said The Lowe Brothers Co. for the years 1917 under the Revenue Act of 1921, or under prior income, excess-profit, or war-profits tax Acts, or under Section 38 of the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, irrespective of any period of limitations.

The Lowe Bros. Co., (Seal)
Taxpayer,
By F. B. Currigan,
Treasurer.

Approved Feb. 20, 1923.
Date

Commissioner.

D. H. Blair,
A
Commissioner of Internal
Revenue.

DEFENDANT'S REQUEST FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed Feb. 15, 1933.

FINDINGS OF FACT.

The defendant respectfully requests the Court to find the facts in this case as follows:

The parties having by stipulation agreed upon the facts, the court is requested to find the facts as stipulated to be true.

CONCLUSIONS OF LAW.

Upon the facts as stipulated and to be found by the court, the defendant respectfully requests the court to make conclusions of law thereon as follows:

1. That the application of the payment of the sum of $11,230.14 in suit arising from overpayment of tax for the year 1918 to the barred tax for the year 1917 is void and consequently the same does not constitute an overpayment of tax for said year 1917 under the provisions of Section 607 of the Revenue Act of 1928, by reason of the restrictive features of Section 609 of said Act.

2. That plaintiff cannot recover in this action under an account stated theory for the reason that the court has not jurisdiction to render judgment in the same.

3. That the plaintiff is not entitled to recover anything by this action.

Frank Hier,
Asst. United States Attorney.

MOTION FOR JUDGMENT—Filed February 15, 1933.

At the close of the testimony, the facts having been stipulated by agreement of the parties, the defendant moves for judgment for that the plaintiff has not produced facts establishing a wrongful or unlawful collection of the tax in suit under the provisions of Section 607 of the Revenue Act of 1928 as alleged, nor has the plaintiff under the facts as stipulated shown grounds for recovery either in law or fact, by which the court can proceed to judgment.

Frank Hier,
Asst. United States Attorney.

DECISION—Filed April 11, 1934.

Nevin, District Judge:

On May 24, 1930, plaintiff herein filed its petition wherein it prays for judgment against the defendant, The United States of America, in the sum of $11,230.14 with interest. Plaintiff alleges this sum to be due it because of an attempted application of a portion of an overassessment allowance to the extent of the sum mentioned from its 1918 tax to a barred deficiency for the year 1917. Some question having been raised as to the nature of plaintiff's action, it was indicated in open court at the time of trial that plaintiff relied upon the petition as setting out a case for refund of overpayment of tax for the period ended September 30, 1917. The case was tried to the court, trial by jury having been waived in writing. Substantially all of the facts were agreed to and are set forth in a stipulation signed by counsel for the respective parties and filed in this court on January 30, 1933.

Briefly, as disclosed by the stipulation, the facts are as follows: Lowe Brothers Company is a corporation

organized and existing under the laws of Ohio. It was incorporated in June, 1929. Lowe Brothers Company (incorporated in 1893) predecessor of the petitioner, filed its income and profits tax return for its fiscal year ended September 30, 1917, on October 31, 1917, and paid the tax shown due thereon. It filed its income and excess profits tax for the fiscal year ended September 30, 1918, on October 31, 1918, and paid the tax shown due thereon. On March 15, 1924, the Commissioner of Internal Revenue assessed against Lowe Brothers Company (incorporated in 1893) an additional income and profits tax for the fiscal year 1917, amounting to $31,771.71. On March 15, 1924, the Commissioner of Internal Revenue signed a schedule of over-assessments indicating that the petitioner's predecessor had overpaid its income and profits tax for the fiscal year ended September 30, 1918, in the amount of $52,710.03. Of this latter amount, the Collector of Internal Revenue, under instructions from the Commissioner, credited the sum of $11,230.14 against the deficiency assessment of $31,771.71 for the fiscal year ended September 30, 1917. The Collector of Internal Revenue applied this credit on April 24, 1924, and the Commissioner approved the credit on May 10, 1924. On April 2, 1928, Lowe Brothers Company (incorporated in 1893) filed a claim for refund for $40,000.00 for its fiscal year ended September 30, 1917. On February 1, 1929, the Commissioner of Internal Revenue gave formal notice of rejection of this claim. On January 25, 1923, and on February 9, 1923, respectively, Lowe Brothers Company (incorporated in 1893) filed income and profits tax waivers, approved by the Commissioner of Internal Revenue, for the fiscal year ended September 30, 1917.

At the conclusion of the presentation of all of the evidence, defendant moved the court for judgment in its behalf upon the grounds that the plaintiff had not produced facts establishing a wrongful or unlawful collection of the tax in suit under the provisions of Section 607 of the Revenue Act of 1928, as alleged, nor, under the facts as stipulated, had plaintiff shown grounds for recovery.

It is claimed upon the part of the defendant that inasmuch as it is conceded that plaintiff's action is based upon a claim for overpayment of the 1917 tax under Section 607 of the Revenue Act of 1928, plaintiff cannot maintain its action or recover judgment because of the provisions of Section 609 of the same Act.

Section 607 provides as follows:

"Any tax (or any interest, penalty, additional amount or addition to such tax) assessed or paid (whether before or after the enactment of this Act) after the expiration of the period of limitations properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim."

Section 609 reads in part as follows:

"Any credit against a liability in respect of any taxable year shall be void if any payment in respect of such liability would be considered an overpayment under Section 607."

The Government contends that under Section 607 the **payment** of a barred tax is considered an overpayment of the tax, giving to the taxpayer the same rights as if no tax for the period involved had ever been due, but that Section 609 is a qualification of Section 607 by providing that **credits** from other taxable years in the nature of over-assessments attempted against a barred tax are a nullity and do not give rise to the rights which would accrue had the settlement of the barred tax been made by actual payment.

This question seems to have been considered and decided in the case of Parks & Woolson Machine Co. v. United States, 58 F. (2d) 868 (certiorari denied 287 U. S. 634) wherein the facts are very similar to those in the instant case.

In their brief, counsel for plaintiff contend that the decision in this case is in conflict with the decision of the Supreme Court of the United States in the case of Graham v. Goodcell, 282 U. S. 409, and they say "There is neither logic nor reason in the rule laid down in Parks & Woolson Machine Co. v. U. S., supra; the decision is inconsistent with Boston Press Metal Co. v. U. S., supra, a prior decision in the same court and affirmed with opinion in the Supreme Court, 282 U. S. 409." Counsel for plaintiff asserts (referring to the Parks & Woolson Machine Company case) that denial of an application for certiorari is not equivalent to an affirmance. This statement unquestionably is correct. Hamilton etc. Co. v. Wolf Bros., 240 U. S. 251. However, the decision by the Supreme Court in these cases (the cases of Boston Press Metal Co. v. U. S. and Graham v. Goodcell are both reported in 282 U. S. 409) was rendered on January 26,

1931, whereas the decision in the Parks case, supra, was not rendered by the Court of Claims until May 31, 1932, and certiorari not denied until October 17, 1932. It would seem, therefore, as claimed by counsel for the Government, that the last expression upon this subject is that contained in the Parks & Woolson Machine Company case, supra, and that the Supreme Court denied certiorari in that case with full knowledge of its views as expressed in the cases reported in the 282 U. S. 409.

From a consideration of the evidence as submitted and the law as applicable thereto, as the Court views it, the Court has arrived at the following:

FINDINGS OF FACT.

1. Lowe Brothers Company is a corporation duly organized and existing under the laws of the State of Ohio having its principal place of business in the City of Dayton, State of Ohio, and was incorporated in June, 1929.

2. Lowe Brothers Company (incorporated in 1893) predecessor of the petitioner, filed its income and profits tax return for its fiscal year ended September 30, 1917, on October 31, 1917, with the proper Collector of Internal Revenue and paid the tax shown due thereon; the predecessor of petitioner filed its income and excess profits tax return for the fiscal year ended September 30, 1918, on October 31, 1918, with the proper Collector of Internal Revenue and paid the tax shown due thereon.

3. On March 15, 1924, the Commissioner of Internal Revenue duly assessed against Lowe Brothers Company (incorporated in 1893) an additional income and profits tax for the fiscal year 1917, amounting to $31,771.71.

4. On March 15, 1924, the Commissioner of Internal Revenue signed a schedule of overassessments indicating that the petitioner's predecessor had overpaid its income and profits tax for the fiscal year ended September 30, 1918 in the amount of $52,710.03. Of said amount the Collector of Internal Revenue, under instructions from the Commissioner, credited the sum of $11,230.14 against the deficiency assessment of $31,771.71 for the fiscal year ended September 30, 1917. The Collector of Internal Revenue applied the said credit on April 24, 1924, and the Commissioner approved said credit on May 10, 1924.

5. On April 2, 1928, the petitioner's predecessor filed a claim for refund for $40,000.00 for its fiscal year ended September 30, 1917. On February 1, 1929, the Commis-

sioner of Internal Revenue gave formal notice of rejection of said claim.

6. On January 25, 1923, and on February 9, 1923, respectively, the petitioner's predecessor filed income and profits tax waivers, approved by the Commissioner of Internal Revenue, for the fiscal year ended September 30, 1917.

CONCLUSIONS OF LAW.

1. The application of the payment of the sum of $11,230.14 in suit arising from overpayment of tax for the year 1918 to the barred tax for the year 1917 is void and consequently the same does not constitute an overpayment of tax for said yea 1917 under the provisions of Section 607 of the Revenue Act of 1928, by reason of the restrictive features of Section 609 of said Act.

2. Defendant's motion for judgment in its behalf made at the close of all of the testimony is well taken and it should be and it is sustained.

An order may be drawn dismissing plaintiff's petition, defendant to recover its costs expended herein.

(Signed) Nevin, J.

Appearances:

For Plaintiff: John E. Hughes,
William Cogger,
Washington, D. C.
Dolle, O'Donnell & Cash,
Cincinnati, Ohio.

For Defendant: Francis C. Canny, U. S. Attorney,
Frederic Johnson, Asst. U. S. Attorney,
Habeth E. Mau, Former U. S. Attorney,
Frank Hier, Former Asst. U. S. Attorney,
C. M. Charest, General Counsel,
Bureau of Internal Revenue,
W. F. Evans, Special Attorney,
Bureau of Internal Revenue.

APPLICATION FOR REHEARING—Filed April 27, 1934.

Now comes the plaintiff and moves the court for an order granting a rehearing for the following reasons:

1. That the decision is contrary to the law laid down by our Court of Appeals in Routzahn vs. Reeves Bros. Co., 59 Fed. 2d. 915.

2. That the decision is contrary to Reeves Bros Co. vs. United States of America, C. C. H. Vol. 3—1933, Sec. 9585, decided after this cause had been argued and briefed.

Rehearing denied—application herein overruled.

An order may be drawn dismissing Plfts' petition in accordance with the decision this Court rendered and filed herein on April 10, 1934.

(Signed) Nevin, J. 7/19/34

ARGUMENT IN SUPPORT OF APPLICATION.

In Reeves Bros. Co. vs. United States of America, C. C. H. Vol. 3—1933, Sec. 9585, decided November 23, 1933, after this case was argued and briefed, Judge West said,

> "West, J.: The sole defense presented by the government in its brief is thus stated: 'Congress voided the credits to the deficiencies in question,' citing Sec. 609, Revenue Act of 1928 and Parks & Woolson Mach. Co. v. U. S., 58 F. (2d) 889. In the cited case the Court of Claims sustained the government's claim 'that there was no collection of the 1917 deficiency, either by cash or credit, for the reason that the credit, by which the Commissioner attempted to collect the 1917 deficiency, was void under section 609 of the Revenue Act of 1928.'
>
> The Reeves Bros. case was originally commenced against the collector, and among other defenses was the one now relied on. On appeal our Circuit Court of Appeals held that the Collector was not liable; but said further:
>
> > No doubt the procedure amounted to a "payment" of the 1917 taxes because upon the authority of the Commissioner's certificate the Treasury retained the overpayments in satisfaction of 1917 taxes .(Graham & Foster vs. Goodcell, 282 U. S. 409, 424) but as pointed out above, appellee's obstacle is that no part of these funds was paid to or exacted or received by appellant.

Application for Rehearing

> As this court expressed the view in the original Reeves Bros. case that Sec. 609 constituted no defense to the collector, and both the Supreme Court and the Sixth Circuit have said that the application of the overpayments of subsequent years to the barred tax of 1917, amounted to the payment thereof, and as the facts in both cases at bar are similar, judgment will be entered in each in favor of the plaintiff."

The Reeves Bros. decision of our own Court of Appeals referred to by Judge West was rendered June 29, 1932, one month later than the decision in Parks & Woolson Mach. Co. vs. U. S., which is in 58 Fed. 2d 868. The Parks case rests solely upon the authority of U. S. Refractories Corp. vs. Commissioner of Internal Revenue, 23 B. T. A. 872. H. C. Clark was of counsel for the United States Government in both the Reeves Bros. and Parks cases and in a very detailed brief presented his argument, based on U. S. Refractories Corp. vs. Commissioner of Internal Revenue, supra, to our Court of Appeals. Our Court of Appeals had before it the very argument made by government counsel in the Parks case and yet it arrived at the conclusion quoted by Judge West.

In the original opinion of Judge West in the Reeves Bros. case, to be found in C. C. H. Vol. 3—1931—Sec. 9022, reliance is placed partly on Graham & Foster vs. Goodcell, 282 U. S. 409, and also on a construction of the word "void" which is used in Sec. 609 of the Revenue Act of 1928,

> "To construe the word 'void' as defendant suggests, would convert what Congress intended as a shield for the taxpayer into a sword for the government.
>
> " 'It is rarely that things are wholly void and without force and effect as to all persons and for all purposes, and incapable of being made otherwise. Things are voidable which are valid and effectual until they are avoided by some act; while things are often said to be void which are without validity until confirmed.' Weeks v. Bridgman, 159 U. S. 541, 547."

As supporting this same construction see United States vs. Steamship Co., 239 U. S. 88, from which we also quote:

"Even when a statute in so many words declares a tranaction void for want of certain forms, the party for whose protection the requirement is made often may waive it, void being held to mean only voidable at the party's choice."

The Federal Courts have denied the taxpayer relief in cases where a refund claim has not been filed **because the government has argued**, as we do here, that the word "void" does not mean "of no effect whatsoever," and in view of the repeal of Sec. 1106 (a) of the Revenue Act of 1926 and Sec. 3226 R. S. as amended in 1926, it may well be doubted if the theory of a common law action in Bonwit Teller & Co. vs. United States, 283 U. S. 258, is sound in the case of an admittedly erroneous or illegal tax collected by the United States unless a refund claim is filed as a condition precedent to suit. See Harvey vs. Mallay, 52 Fed. 885. The position of the government in this case is not only contrary to law as laid down in reported cases but is contrary to the very procedure approved by the Commissioner of Internal Revenue as shown by regulations promulgated with every revenue law since 1918.

It is no wonder then that our Court of Appeals tacitly approved Judge West's interpretation of the word "void" and also called the credit in a case of this kind in fact a "payment."

We respectfully submit that the rehearing should be granted and judgment rendered in accordance with the decisions of our Court of Appeals and of Judge West.

Dolle, O'Donnell & Cash,
Attorneys for Plaintiff.

ENTRY—Filed October 22, 1934.

This cause came on to be heard before the Court on the pleadings and an agreed statement of facts after a jury had been waived.

At the request of both parties, the Court makes a special finding of facts as follows:

1. Lowe Brothers Company is a corporation duly organized and existing under the laws of the State of Ohio, having its principal place of business in the City of Dayton, State of Ohio, and was incorporated in June, 1929.

2. Lowe Brothers Company (incorporated in 1893), predecessor of the petitioner, filed its income and profits tax return for its fiscal year ended September 30, 1917, on October 31, 1917, with the proper Collector of Internal Revenue and paid the tax shown due thereon; the predecessor of petitioner filed its income and excess profits return for the fiscal year ended September 30, 1918, on October 31, 1918, with the proper Collector of Internal Revenue and paid the tax shown due thereon.

3. On March 15, 1924, the Commissioner of Internal Revenue only assessed against Lowe Brothers Company (incorporated in 1893) an additional income and profits tax for the fiscal year 1917 amounting to $31,771.71.

4. On March 15, 1924, the Commissioner of Internal Revenue signed a schedule of over-assessments indicating that the petitioner's predecessor had overpaid its income and profits tax for the fiscal year ended September 30, 1918, in the amount of $52,710.03. Of said amount the Collector of Internal Revenue, under instruction from the Commissioner, credited the sum of $11,230.14 against the deficiency assessment of $31,771.71 for the fiscal year ended September 30, 1917. The Collector of Internal Revenue applied the said credit on April 24, 1924, and the Commissioner approved said credit on May 10, 1924.

5. On April 2, 1928, the petitioner's predecessor filed a claim for refund for $40,000.00 for its fiscal year ended September 30, 1917. On February 1, 1929, the Commissioner of Internal Revenue gave formal notice of the rejection of said claim.

6. On January 25, 1923, and on February 9, 1923, respectively, the petitioner's predecessor filed income and profits tax waivers, approved by the Commissioner of Internal Revenue, for the fiscal year ended September 30, 1917. These income and profits tax waivers expired on April 1, 1924.

Entry

and concluded the law on such facts to be as follows:

1. The application of the payment of the sum of $11,230.14 in suit arising from overpayment of tax for the year 1918 to the barred tax for the year 1917 is void and consequently the same does not constitute an overpayment of tax for the said year 1917 under the provisions of Section 607 of the Revenue Act of 1928 by reason of the restrictive features of Section 609 of said act.

2. Plaintiff's motion to declare the law to be that the application of the credit to the 1917 tax constituted a payment of said 1917 tax, is denied.

3. Plaintiff's motion for judgment is denied and defendant's motion for judgment in its behalf, made at the close of all the testimony, is well taken and it should be sustained.

The premises considered, it is hereby Ordered on the basis of the foregoing facts found (which were stipulated by the parties) and on the basis of the foregoing conclusions of law, that the plaintiff's petition be and the same is hereby dismissed with plaintiff's costs and that plaintiff's motion for a new trial be and the same is hereby denied, to all of which the plaintiff duly excepts, and it is further Ordered that the plaintiff's application for rehearing be and the same is hereby denied at the plaintiff's cost.

To the Court's conclusions of law and to the orders herein made the plaintiff excepts on the ground that the Court's conclusions of law are erroneous and on the ground that judgment should have been entered for the plaintiff on the basis of the facts stipulated and found.

Enter:

(Signed) Nevin,
Judge.

Approved as to form only:
John E. Hughes,
Counsel for Plaintiff.
Frederic W. Johnson, Ass't U. S. Atty.,
Counsel for Defendant.

PETITION FOR APPEAL AND ASSIGNMENT OF ERRORS—Filed Jan. 17, 1935.

To the Hon. Robert R. Nevin, District Judge:

The above named Lowe Brothers Company, feeling aggrieved by the final judgment rendered and entered in the above entitled cause on the 22nd day of October, 1934, does hereby appeal from said final judgment to the United States Circuit Court of Appeals for the Sixth Circuit for the reasons set forth in the assignment of errors filed herewith and attached hereto, and prays that this appeal be allowed and that citation be issued as provided by law, and that a transcript of record, proceedings and documents, on which said final judgment was based, duly authenticated, be sent to the said United States Circuit Court of Appeals for the Sixth Circuit under the rules of such court in such cases made and provided.

And your petitioner further prays that an order relating to the security to be required of it be made.

John E. Hughes,
Wm. Cogger,
Dolle, O'Donnell & Cash,
Attorneys for Plaintiff.

ASSIGNMENT OF ERRORS—Filed Jan. 17, 1935.

Comes now the plaintiff, Lowe Brothers Company, a corporation, and for its assignment of errors says that the Court erred as follows:

1. The Court erred in holding that the credit of $11,230.14 to the deficiency for the fiscal year ended September 30, 1917, did not constitute a payment of $11,230.14 on said deficiency.

2. The Court erred in failing to hold that plaintiff's cause of action arose on the enactment of Sections 607 and 609 of the Revenue Act of 1928.

Assignment of Errors

3. The Court erred in holding that the credit of the over payment of tax for 1918 to the deficiency for 1917 was wholly void and erred in its construction of the word "void."

4. The Court erred in failing to render judgment to the plaintiff and in rendering judgment for the defendant.

5. The Court erred in holding that the findings of fact were sufficient to sustain the judgment for the defendant.

6. The Court erred in not rendering judgment for the plaintiff on the findings of fact.

(Signed) John E. Hughes,
(Signed) William Cogger,
(Signed) Dolle, O'Donnell & Cash,
Attorneys for Plaintiff.

ORDER ALLOWING APPEAL—Filed Jan. 18, 1935.

On motion of Dolle, O'Donnell & Cash, et al., solicitors and counsel for complainant, it is hereby ordered that an appeal to the United States Circuit Court of Appeals for the Sixth Circuit from the final judgment heretofore entered herein be and the same is hereby allowed, and that a certified transcript of the record, exhibits, stipulations and all proceedings be forthwith submitted to said United States Circuit Court of Appeals for the Sixth Circuit.

It is further ordered that the bond on appeal be fixed in the sum of $250.00.

Dated the 18th day of January, 1935.

(Signed) Nevin, J.

BOND ON APPEAL—Filed Jan. 18, 1935.

Know All Men By These Presents:

That we, Lowe Brothers Company, as principal, and Royal Indemnity Company, as surety, are held and firmly bound to The United States of America in the sum of Two Hundred Fifty ($250.00) Dollars, lawful money of the United States, to be paid to them and their successors, to which payment well and truly to be made we bind ourselves and each of us jointly and severally and all of our successors and assigns by these presents.

Sealed with our seals and dated this day of January, 1935.

Whereas, the above named Lowe Brothers Company has prosecuted an appeal to the United States Circuit Court of Appeals for the Sixth Circuit to reverse the judgment of the District Court for the Southern District of Ohio, Western Division in the above entitled cause:

Now, Therefore, the condition of this obligation is such that if the above named Lowe Brothers Company shall fail in its said appeal to effect and answer all costs, if it failed to make good its plea, then this obligation shall be void, otherwise to remain in full force and effect.

Lowe Brothers Company,
By James B. O'Donnell,
Attorney in fact.
Royal Indemnity Company,
By W. A. Earls,
Attorney in Fact.

(Seal)

State of Ohio }
Hamilton County } ss.

On the 16th day of January, 1935, personally appeared before me Lowe Brothers Company by James B. O'Donnell, its attorney in fact, and Royal Indemnity Company by W. E. Earls, its attorney in fact; respectively known to me to be the persons and parties described in and who duly executed the foregoing instrument as parties thereto, and respectively acknowledged as for itself and himself that they executed the same as their free act and deed for the purposes therein set forth.

And said Lowe Brothers Company, by James B. O'Donnell, its attorney in fact, and Royal Indemnity Company by W. E. Earls, its attorney in fact, being respectively by me duly sworn, says each for itself and

himself that each company respectively is authorized to do business in the State of Ohio and in the Southern District of Ohio, Western Division, and that each company is worth the sum of $250.00 and over and above its just debts and legal liability and property exempt from execution.

Lowe Brothers Company,
By James B. O'Donnell,
Attorney in Fact.
Royal Indemnity Company,
By W. A. Earls,
Attorney in Fact.

Sworn to and subscribed before me this day of January, 1935.

John R. Hahn,
Notary Public, Hamilton County, Ohio.

No objections.
Frederic W. Johnson,
Ass't U. S. Atty.

The within bond is approved both as to sufficiency and form this 18th day of January, 1935.

(Signed) Nevin, J.

CITATION ON APPEAL—Filed Jan. 18, 1935.

To the United States of America Through Its District Attorney for the Southern District of Ohio, Greetings:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Sixth Circuit to be held at Cincinnati, Ohio, on the 16 day of February, 1935, pursuant to an order allow-

ing an appeal filed and entered in the Clerk's Office of the District Court of the United States for the Southern District of Ohio, Western Division, from a final judgment signed, filed and entered on the 22nd day of October, 1934, in that certain suit, being in law No. 4290, wherein Lowe Brothers Company is plaintiff and The United States of America, is defendant and appellee, to show cause, if any there be, why the final judgment rendered against the said plaintiff appellant, as in said order allowing appeal mentioned, should not be corrected and why justice should not be done to the parties in that behalf.

Witness the Honorable Robert R. Nevin, United States District Court Judge for the Southern District of Ohio, Western Division, this 18th day of January, 1935, and of the Independence of the United States the One Hundred Fifty-ninth.

(Signed) Nevin,
United States District Court Judge
for the Southern District of Ohio,
Western Division.

Service of the above citation is hereby acknowledged and the appearance of the appellee, The United States of America, is hereby entered.

Frederic W. Johnson,
Asst. U. S. Atty.

PRAECIPE FOR RECORD AND PROCEEDINGS

—Filed Jan. 18, 1935.

To the Clerk:

Please prepare a transcript of the papers, stipulations and proceedings for appeal to the U. S. Circuit Court of Appeals:

1. Petition.
2. Affidavit of Service.
3. Answer.
4. Reply.
5. Waiver of Jury.
6. Stipulation of Facts and Attached Exhibits.
7. Request for Separate Findings and Conclusions of Law.
8. Motion for Judgment.
9. Decision of the Court.
10. Application for Rehearing.
11. Judgment Entry.
12. Petition for Appeal.
13. Assignment of Errors.
14. Order allowing Appeal.
15. Bond on Appeal.
16. Citation and Waiver of Service and Appearance.
17. Praecipe.

Dolle, O'Donnell & Cash,
Attorneys for Ptf.

O. K.
F. W. Johnson,
Ass't U. S. Atty.

CLERK'S CERTIFICATE.

United States of America }
Southern District of Ohio } ss.

I, Harry F. Rabe, Clerk of the United States District Court in and for the Southern District of Ohio, do hereby certify that the annexed and foregoing is a true and full copy of the original papers, exhibits, and proceedings in the matter of Lowe Brothers Company v. The United States of America, at Law 4290, as is indicated in the Praecipe for Record and Proceedings on Appeal, filed on January 18th, 1935, now remaining among the records of the said Court in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Cincinnati, Ohio this 16th day of February, A. D. 1935.

Harry F. Rabe, Clerk,
By H. E. Parker,
Deputy Clerk.

(Seal)

PROCEEDINGS IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SIXTH CIRCUIT

CAUSE ARGUED AND SUBMITTED

(November 8, 1937—Before: SIMONS, ALLEN and DRUFFEL, JJ.)

This cause is argued by J. B. O'Donnell for Appellant and by E. E. Angevine for Appellee and is submitted to the Court.

JUDGMENT

(Filed November 11, 1937)

Appeal from the District Court of the United States for the Southern District of Ohio.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Ohio, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause dismissing the petition be and the same is hereby affirmed for lack of jurisdiction in the District Court to entertain it.

MEMORANDUM OPINION

(Filed November 11, 1937)

PER CURIAM. The appellant sought to recover a sum in excess of ten thousand dollars collected by the Commissioner of Internal Revenue in one year by way of a credit on the taxes for that year of an overpayment declared in respect to taxes for another year. The District Court sustained a motion for judgment on behalf of the appellee upon the ground that the application to the barred deficiency tax for the year 1917 of a credit in the sum of $11,239.14 arising from overpayment of tax for the year 1918 is void and consequently does not constitute an overpayment of tax for the year 1917 under the provisions of Sec. 607 of the Revenue Act of 1928, by reason of the restrictive features of Sec. 609 of such Act.

This ruling constituted error. *United States* v. *John Gallagher Co.*, 83 Fed. (2d) 368 (C. C. A. 6).

On the issue of the jurisdiction of the District Court to entertain the suit under Sec. 24 of the Judicial Code as amended (28 U. S. A., Sec. 41) the order must be affirmed.

In *United States* v. *Reeves Bros. Co.*, 83 Fed. (2d) 121, we held that the jurisdiction conferred upon District Courts to hear and determine suits against the United States for the recovery of an illegally or erroneously exacted tax in excess of $10,000, is limited to cases where the tax was collected by a Collector of Internal Revenue who is dead or out of office, and that it was as essential to the jurisdiction that the tax was collected by a collector as, where so collected, that he be dead or out of office. Here, as there, the tax was not collected by a collector, and the court has no jurisdiction. *Moses* v. *United States*, 61 Fed. (2d) 791 (C. C. A. 2).

United States v. *Piedmont Mfg. Co.*, 89 Fed. (2d) 296, is cited in opposition to this view, and we are asked to reconsider and reverse. We are unable to view the Piedmont decision as persuasive of error in the Reeves case since the collector there involved was still in office when the suit was commenced, in consequence of which the Supreme Court failed to recognize a conflict between the two decisions, as is shown by its

denial of the petition for rehearing of the denial of the writ of certiorari in *United States* v. *Reeves Bros. Co., supra* (57 Sup. Ct. 920).

The judgment below dismissing the petition is affirmed for lack of jurisdiction in the District Court to entertain it.

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49 TO 55

ORDER DENYING PETITION FOR REHEARING

(Filed December 17, 1937)

Upon consideration of the petition for rehearing filed on behalf of the appellant in the above cause, it is ordered that the per curiam opinion heretofore filed therein be clarified by striking out the phrase "there involved" in the second last paragraph thereof and substituting the phrase "in the Reeves case," and

IT IS FURTHER ORDERED that the petition for rehearing be denied.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

I, J. W. MENZIES, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of the record and proceedings in the case of *Lowe Brothers Company* v. *United States of America*, No. 7034, as the same remains upon the files and records of said United States Circuit Court of Appeals for the Sixth Circuit, and of the whole thereof.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of said Court at the City of Cincinnati, Ohio, this 4th day of March, A. D. 1938.

J. W. MENZIES,
Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

(SEAL)

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 11, 1938

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

FILED
MAR 14 1938
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1937.

No. 864.

LOWE BROTHERS COMPANY, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR THE WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

JAMES B. O'DONNELL,
Carew Tower,
Cincinnati, Ohio.

WILLIAM COGGER,
315 Evening Star Bldg.,
Washington, D. C.
Attorneys for Petitioner.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Case Cited

United States v. Piedmont Mfg. Co., 89 Fed. (2d) 296 . . 5, 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1937.

No. ——.

LOWE BROTHERS COMPANY, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR THE WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Lowe Brothers Company, a corporation of Ohio, by James B. O'Donnell and William Cogger, its attorneys, respectfully petitions this Honorable Court for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit to review the judgment of that Court entered in the above cause on November 11, 1937. (R. 47)

The petitioner's application for rehearing was denied December 17th, 1937. (R. 55)

Opinions Below.

The opinion of the United States District Court (R. 30 to 34) is published in 8 F. Supp. 1016. The opinion of the Circuit Court of Appeals (R. 48) is published in 92 F. (2d) 905.

Jurisdiction.

The judgment of the Circuit Court of Appeals was rendered November 11, 1937 (R. 47), and a petition for rehearing was denied December 17th, 1937. (R. 55)

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

Question Presented.

Where an income tax exceeding $10,000 is collected by credit does the District Court of the United States have jurisdiction of a suit against the United States for its recovery if both the Collector in office when the credit collection was made and the Collector to whom the overpayment credited was paid are out of office at the time the suit is begun.

Statute Involved.

Judicial Code, as amended:

> Sec. 24. The district courts shall have original jurisdiction as follows:
>
> * * * * * * * * * *
>
> Twentieth. Concurrent with the Court of Claims, of all claims not exceeding ten thousand dollars founded upon the Constitution of the United States or any law of Congress, * * * and of any suit or proceeding commenced after the passage of the Revenue Act of 1921, for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws even if the claim exceeds $10,000, if the collector of internal revenue by whom such tax, penalty, or sum was collected is dead or is not in office as collector of internal revenue at the time such suit or proceeding is commenced. * * * All suits brought and tried under the provisions of this paragraph shall

be tried by the court without a jury. (U. S. C., Title 28, Sec. 41.)

Revenue Act of 1928, c. 852, 45 Stat. 791:

Specification of Error to be Urged.

The Circuit Court of Appeals erred in holding the District Court had no jurisdiction of this suit.

Statement of the Case.

The facts in the case are contained in the allegations of the petition (R. 1-10), admitted in answer (R. 11-14); stipulation of facts (R. 17-28), and special findings of fact by the court at the request of the parties as set forth in entry filed October 22, 1934. (R. 38)

The facts material to the decision of the questions presented in this case are as follows:

The petitioner is a corporation existing under the laws of Ohio, with its principal place of business in the City of Dayton, Ohio, and was incorporated in June, 1929 (R. 38), and acquired the claim herein sued on in a merger, as set forth in allegation I of the Petition. (R. 1)

The petitioner is a successor to Lowe Brothers Company, a corporation incorporated in 1893. The predecessor corporation filed its income and profits tax return for the year 1917, on October 31, 1917, with the proper Collector of Internal Revenue and paid the tax shown to be due thereon; on October 31, 1918, the predecessor filed its income and excess profits tax return for the fiscal year ended September 30, 1918, with the proper Collector of Internal Revenue and paid the tax shown to be due thereon. (R. 38)

On March 15, 1924, the Commissioner of Internal Revenue assessed against Lowe Brothers Company, the predecessor, an additional income and profits tax for the fiscal year 1917 of $31,771.71. (R. 38)

On March 15, 1924, the Commissioner of Internal Revenue signed a schedule of overassessments indicating that

the petitioner's predecessor had overpaid its income and profits tax for the fiscal year ended September 30, 1918, in the amount of $52,710.03. Of said amount the Collector of Internal Revenue, under instruction from the Commissioner, credited the sum of $11,230.14 against the deficiency assessment of $31,771.71 for the fiscal year ended September 30, 1917. The Collector of Internal Revenue applied the credit on April 24, 1924, and the Commissioner approved the credit on May 10, 1924. (R. 38)

On April 2, 1928, the petitioner's predecessor filed a claim for refund for $40,000 for its fiscal year ended September 30, 1917, which claim was formally rejected by the Commissioner on February 1, 1929. (R. 38)

On January 25, 1923, and on February 9, 1923, respectively, petitioner's predecessor filed income and profits tax waivers for the fiscal year ended September 30, 1917. (R. 38)

These waivers expired on April 1, 1924. (R. 38)

This suit is brought against the United States for the reason that Charles M. Dean, who was Collector of Internal Revenue for the First District of Ohio in 1924, was no longer in office as Collector at the time this suit was commenced. (R. 3)

This suit, which is for the recovery of $11,230.14 (R. 3), was commenced May 24, 1930. (R. 1, 10)

The foregoing statement of facts is taken verbatim from the respondent's brief in the Circuit Court of Appeals. To this may be added that the Circuit Court of Appeals in its opinion (R. 48), held that the petitioner was entitled to recover on the merits and that the District Court was in error in that respect but affirmed the judgment on the ground that the District Court had no jurisdiction in the case. (R. 49) This question was not considered by the District Court and was not raised there.

Reasons for Granting the Writ.

The decision of the Circuit Court of Appeals for the Sixth Circuit in the case at bar is squarely in conflict with the decision of the Circuit Court of Appeals for the Fourth Circuit in *United States* v. *Piedmont Mfg. Co.*, 89 F. (2d) 296. That case holds a collector does collect a tax by the credit process. The case at bar holds otherwise.

The question of the jurisdiction of the United States District Court is one of great importance because thousands of credits in tax accounts are made in collectors' offices every year and it is important to determine whether taxpayers scattered throughout this wide and extensive country must come to Washington to sue in the Court of Claims or may sue in such cases in the district where they live. In many such cases part of a single liability is collected in case and the balance of it by credit.

For the foregoing reasons it is respectfully submitted that the writ of certiorari should be granted.

JAMES B. O'DONNELL,
Carew Tower,
Cincinnati, Ohio.

WILLIAM COGGER,
315 Evening Star Bldg.,
Washington, D. C.
Attorneys for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1937.

No. ——.

LOWE BROTHERS COMPANY, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

BRIEF FOR PETITIONER.

A reading of the decision of the Circuit Court of Appeals for the Fourth Circuit in *United States* v. *Piedmont Mfg. Co.*, 89 Fed. (2d) 296, and of the decision of the Circuit Court of Appeals for the Sixth Circuit in the case at bar discloses a sharp and square conflict in the interpretation of a statute which confers jurisdiction on the District Courts of the United States.

In the case of the *Reeves Brothers Company* in this court, No. 272, October Term, 1936, a petition for rehearing was filed after the decision of the Circuit Court of Appeals in the *Piedmont* case. In his answer to that petition for rehearing the Solicitor General said:

> "In *United States* v. *Piedmont Mfg. Co.*, the suit proceeded on the theory that the tax in question was collected on the credit process in 1924, and that the col-

lector then in office was not in office at the time the suit was instituted, *thus bringing the case within the scope of Section 24 (20) of the Judicial Code.* The taxpayer in the instant case (Reeves Bros.) could not proceed on this theory for the collector in office at the time the credit was made, in 1924, was still in office when this suit was filed (R. 6, 11)." (Italics ours)

That distinction cannot be made in the case at bar because in the case at bar the collector who was in office at the time the credit was made in 1924, was not in office when this suit was filed. (R. 3, 13) It, therefore, follows that the decisions of the two circuits are squarely in conflict. If the District Court had jurisdiction in the Piedmont case it has jurisdiction in this case for the facts upon which jurisdiction depends are precisely the same in both cases *i.e.*, the collection was by credit and in both cases the Collector in office when the credit was made was out of office when the suit was begun.

As the Solicitor General stated in the Reeves case in this Court, it was held in the Piedmont case a collection "by the credit process" brought "the case within the scope of Section 24 (20) of the Judicial Code" and as the Sixth Circuit in the instant case has held the contrary and decided that such a collection did not satisfy the requirements of Section 24 (20) of the Judicial Code the two cases are squarely in conflict. In its opinion the Sixth Circuit makes no attempt to answer the convincing arguments advanced in the Piedmont case 89 Fed. (2d) 296 in support of the conclusion there reached.

The question of jurisdiction in cases of this kind is an important one. It will have to be settled sometime and should be settled by this Court in this case. Indubitably it was the intention of Congress to permit taxpayers to sue in the District where they live rather than come to Washington to do so in the Court of Claims. Moreover, if the decision in the case at bar is right and the decision of the Circuit Court of Appeals for the Fourth Circuit is wrong, it seems

Congress will have to enact amendatory legislation for hundreds of collections by credit are made annually.

We respectfully submit that this court should grant the Petition for Certiorari and determine between the conflicting interpretations of the Statute in question.

James B. O'Donnell,
3715 Carew Tower,
Cincinnati, Ohio.

William Cogger,
315 Evening Star Bldg.,
Washington, D. C.
Attorneys for Petitioner.

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IN THE

Supreme Court of the United States

October Term, 1937.

No. 864

LOWE BROTHERS COMPANY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

BRIEF OF THE PETITIONER.

JOHN E. HUGHES,
First National Bank Bldg.,
Chicago, Illinois,

JAMES B. O'DONNELL,
Carew Tower,
Cincinnati, Ohio,

WILLIAM COGGER,
Evening Star Building,
Washington, D. C.,

Counsel for Petitioner.

U. S. Law Printing Company, 2817 N. Halsted St., Chicago, Ill.

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IN THE

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October Term, 1937.

No. 864

LOWE BROTHERS COMPANY,

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v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

BRIEF OF THE PETITIONER.

OPINIONS BELOW.

The opinion of the District Court (R. 30 to 34) is published in *8 F. Supp. 1016*. The opinion of the Circuit Court of Appeals (R. 48) is published in *92 F. (2d) 905*.

JURISDICTION.

The judgment of the Circuit Court of Appeals was rendered November 11, 1937 (R. 47), and a petition for rehearing was denied December 17, 1937 (R. 55).

The jurisdiction of this Court is invoked under *Section 240 (a) of the Judicial Code* as amended by the Act of February 13, 1925. *Certiorari* was granted April 25, 1938.

QUESTION PRESENTED.

Where an income tax exceeding $10,000 is collected by credit does the District Court of the United States have jurisdiction of a suit against the United States for its recovery if both the Collector in office when the credit collection was made and the Collector to whom the overpayment credited was paid in cash are out of office at the time the suit is begun.

STATUTES INVOLVED.

Judicial Code as amended:

> *Sec. 24.* The District Courts shall have original jurisdiction as follows:
>
> * * *
>
> Twentieth. Concurrent with the Court of Claims, of all claims not exceeding ten thousand dollars founded upon the Constitution of the United States or any law of Congress, * * * and of any suit or proceeding commenced after the passage of the Revenue Act of 1921, for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws even if the claim exceeds $10,000, if the collector of internal revenue by whom such tax, penalty, or sum was collected is dead or is not in office as collector of internal revenue at the time such suit or proceeding is commenced. * * * All suits brought and tried under the provisions of this paragraph shall be tried by the court without a jury. *(U. S. C., Title 28, Sec. 41.)*

Section 24 of the Judicial Code (paragraph 5) reads:

"*Sec. 24.* The District Courts shall have original jurisdiction as follows:

* * *

(5) Cases under internal revenue, customs, and tonnage laws. Fifth. Of all cases arising under any law providing for internal revenue, or ~~from~~ revenue from imports or tonnage, except those cases arising under any law providing revenue from imports, jurisdiction of which has been conferred upon the Court of Customs Appeals. *(R. S., Sec. 563, par. 5, Sec. 629, par. 4; Mar. 3, 1911, c. 231, Sec. 24, par. 5, 36 Stat. 1092.)*"

"Revised Statutes:

"*Sec. 989.* When a recovery is had in any suit or proceeding against a collector or other officer of the revenue for any act done by him, or for the recovery of any money exacted by or paid to him and by him paid into the Treasury, in the performance of his official duty, and the court certifies that there was probable cause for the act done by the collector or other officer or that he acted under the direction of the Secretary of the Treasury, or other proper officer of the Government, no execution shall issue against such collector or other officer, but the amount so recovered shall, upon final judgment, be provided for and paid out of the proper appropriation from the Treasury.

"*(U. S. C., Title 28, Sec. 842.)*"

"*Revenue Act of 1928, c. 852, 45 Stat. 791, 874, 875:*

"*Sec. 607.* Effect of Expiration of Period of Limitation Against United States.

"Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this Act) after the expiration of the period of limitation properly applicable thereto shall be considered an over-

payment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of Limitation for filing such claim.

"(U. S. C. Sup., Title 26, Sec. 2607.)

"Sec. 609. Erroneous Credits.

"(a) Credit against barred deficiency.—Any credit against a liability in respect of any taxable year shall be void if any payment in respect of such liability would be considered an overpayment under *section 607.*

"(c) Application of section.—The provisions of this section shall apply to any credit made before or after the enactment of this Act.

"(U. S. C. Sup., Title 26, Sec. 2609.)[1]

"The Commissioner is authorized and required to make the inquiries, determinations, and assessments of all taxes and penalties imposed by this title where such taxes have not been duly paid by stamp at the time and in the manner provided by law.

"(U. S. C. A., Title 26, Sec. 1530; R. S. 3182.)

"The Commissioner shall certify a list of such assessments when made to the proper collectors, respectively, who shall proceed to collect and account for the taxes and penalties so certified.

"(U. S. C. A., Title 26, Sec. 1531; R. S. 3182.)"

"It shall be the duty of the collectors or their deputies, in their respective districts, and they are authorized, to collect all the taxes imposed by law, however the same may be designated.

"(U. S. C., Title 26, Sec. 1541 (a); R. S. 3183.)

"Every collector within his collection district shall see that all laws and regulations relating to the col-

1. Sections 607 and 609 were construed by this Court in **Stearns Co. v. United States, 291 U. S. 54,** at p. **60;** "to invalidate such a credit if made by the Commissioner of his own motion without the taxpayer's approval or with approval falling short of inducement or request". Such was the credit in the case at bar. It was illegal because made after the right to make it was barred and it was invalid under the quotation from the opinion of this Court.

lection of internal-revenue taxes are faithfully executed and complied with, and shall aid in the prevention, detection, and punishment of any frauds in relation thereto.

"(U. S. C., Title 26, Sec. 1544.)

"Where there has been an overpayment of any tax imposed by this chapter, the amount of such overpayment shall be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance shall be refunded immediately to the taxpayer.

"(U. S. C., Title 26, Sec. 322 (a).)"

SPECIFICATION OF ERROR TO BE URGED.

The Circuit Court of Appeals erred in holding the District Court had no jurisdiction of this suit.

STATEMENT OF THE CASE.

As stated by the respondent in its memorandum in response to the petition for the writ

"the case involves crediting of an overpayment of taxes for the year 1918 against a deficiency in taxes for the year 1917 in the amount of $11,230.14, at a time when the collection of the deficiency was barred by statute".

The facts in the case are contained in the allegations of the petition (R. 17-28), and special findings of fact by the Court at the request of the parties as set forth in the entry filed October 22, 1934 (R. 38).

The facts material to the decision of the questions presented in this case are as follows:

The petitioner is a corporation existing under the laws of Ohio, with its principal place of business in the City of Dayton, Ohio, and was incorporated in June, 1929 (R.

38), and acquired the claim herein sued on in a merger as set forth in allegation I of the Petition (R. 1, 11).

The petitioner is a successor to Lowe Brothers Company, a corporation incorporated in 1893. The predecessor corporation filed its income and profits tax return for the year 1917, on October 31, 1917, with the proper Collector of Internal Revenue and paid the tax shown to be due thereon; on October 31, 1918, the predecessor filed its income and excess profits tax return for the fiscal year ended September 30, 1918, with the proper Collector of Internal Revenue and paid the tax shown to be due thereon (R. 38).

On March 15, 1924, the Commissioner of Internal Revenue assessed against Lowe Brothers Company, the predecessor, an additional income and profits tax for the fiscal year 1917 of $31,771.71 (R. 38).

On March 15, 1924, the Commissioner of Internal Revenue signed a schedule of overassessments indicating that the petitioner's predecessor had overpaid its income and profits tax for the fiscal year ended September 30, 1918, in the amount of $52,710.03. Of said amount the Collector of Internal Revenue credited the sum of $11,230.14 against the deficiency assessment of $31,771.71 for the fiscal year ended September 30, 1917. The Collector of Internal Revenue applied the credit on April 24, 1924, and the Commissioner approved the credit on May 10, 1924 (R. 38).

On April 2, 1928, the petitioner's predecessor filed a claim for refund for $40,000 for its fiscal year ended September 30, 1917, which claim was formally rejected by the Commissioner on February 25, 1929 (R. 38).

On January 25, 1923, and on February 9, 1923, respectively, petitioner's predecessor filed income and profits tax

waivers for the fiscal year ended September 30, 1917 (R. 38). These waivers expired on April 1, 1924 (R. 38).

This suit is brought against the United States for the reason that Charles M. Dean, who was Collector of Internal Revenue for the First District of Ohio in 1924, was no longer in office as Collector of Internal Revenue at the time this suit was commenced (R. 3).

This suit, which is for the recovery of $11,230.14 (R. 3), was commenced May 24, 1930 (R. 1, 10).

The foregoing statement of facts is taken *verbatim* from the respondent's brief in the Circuit Court of Appeals. To this may be added that the Circuit Court of Appeals in its opinion (R. 48), held that the petitioner was entitled to recover on the merits and that the District Court was in error in that respect but affirmed the judgment on the ground that the District Court had no jurisdiction in the case (R. 49). This question was not considered by the District Court and was not raised here.

SUMMARY OF ARGUMENT.

The Court below held that the credit of the 1918 overpayment to the 1917 tax constituted a collection in the 1917 tax. The petition for the writ of *certiorari* did not seek review of this question but only of the question whether the Court below erred in holding that the District Court had jurisdiction. Respondent did not seek the writ of *certiorari* and consequently, it may be that only the question of the jurisdiction of the District Court is here for review. See *Alexander v. Cosden Pipe Line Co., 290 U. S. 484, 487.* Cases collected *Harvard Law Review, April 1938, p. 1058.* However, out of an abundance of caution we shall argue this question also.

Under the carefully reasoned opinion in *United States v. Piedmont Mfg. Co., 89 F. (2d) 296 (C. C. A. 4th),* which the respondent in its response to the writ, concedes is in conflict with the case at bar, the District Court had jurisdiction. When the Circuit Court of Appeals for the Fourth Circuit decided that case, it had the benefit of the decisions relied upon by the respondent in the case at bar. Since the decision of the *Piedmont case,* it has been cited with approval and followed by the Circuit Court of Appeals for the First Circuit in *United States v. Bertelsen & Peterson Engineering Co., 95 F. (2d)* ...., not yet published in the Federal Reporter, but appearing in *C. C. H. Tax Service, Para. 9201.* Except for details, little can be added to the reasoning in *United States v. Piedmont Mfg. Co., 89 F. (2d) 296.*

It is true that under the decision of the Court of Claims in *Parks v. Woolson Mach. Co., 58 F. (2d) 868,* the credit did not constitute a collection of the 1917 tax, but the Judge who wrote that opinion stated it was wrong in *First National Bank of Beaver Falls v. United States, 8 F. Supp. 484, 488,* and the Court below agreed with this conclusion in *United States v. John Gallagher Co., 83 F. (2d) 368,* and in its decision in the case at bar. As previously pointed out review of this portion of the decision was not sought by anyone in the case at bar. However, if the Court below was wrong in this then the suit may be sustained as one to recover 1918 taxes.

Respondent, in its memorandum in answer to the petition for the writ, admits that the credit was outlawed. In such circumstances, the statutory law of this country unquestionably provides for its repayment to the taxpayer. The plain mandate of the statute should not be

defeated by subtle and attenuated technicalities, the statute having been passed pusuant to the Constitution is expressly declared by the Constitution to be the supreme law of the land.

Thousands of collections by credit are made annually. Indeed, sometimes the same liability is collected partly in cash and partly by credit. It will work inconvenience and hardship on taxpayers and cause delay to force them, in such cases, to resort to the Court of Claims, which will soon find itself congested with litigation other than tax litigation arising out of the multifarious Government activities undertaken in recent years. Congress would have had no reason for distinguishing a collection in cash from a collection by credit and did not intend to do so and no reason can be suggested why it should have so intended.

Although the rule of sovereign immunity from suit is firmly established here, yet it was adopted from England without considering that the reason upon which it rested had no application to the American Government. For this reason it should not be extended beyond the inescapable dictates of necessity and if a statute can be construed to confer jurisdiction it should be so construed. That it can be so construed is evidenced by *United States v. Piedmont Mfg. Co., 89 F. (2d) 296 (C. C. A. 4th)*, and also by *United States v. Bertelsen & Peterson Engineering Co., 95 F. (2d) (C. C. A. 1st)*, and also by the decisions of the United States District Judges in each of those cases and by the decision of District Judge West in *Reeves Bros. Co. v. United States.*

ARGUMENT.

A Refund To The Taxpayer Of The Money Sued For Was Clearly Commanded By The Statutory Law Of This Country.

It is admitted in respondent's memorandum in response to the petition for the writ that the credit was barred by the statute of limitations. In such case, *Sections 607 and 609 of the Revenue Act of 1928* clearly and unequivocally command refund of the money to the taxpayer. *McEachern v. Rose, 302 U. S. 56.*

The question of whether this refund should be made as a matter of policy was solely for the consideration of the law-making body. The history of the legislation requiring its refund, is set forth in Appendix A of this brief.

That a timely claim for refund was filed by the taxpayer as required by *Section 607* is not questioned.

This refund claim should have been allowed by the Executive Department of the Government. Its denial by that Department was without justification. That Department had no right to deny it because it was not in sympathy with the statutory law. *Section 3 of Article II of the Constitution* enjoins upon the President a duty in these words, "He shall take care that the laws be faithfully executed". This Court has said:

> "And no higher duty rests upon this Court than to enforce by its decree, the will of the legislative de-

partment of the government, as expressed in a statute, unless such statute be plainly and unmistakably in violation of the Constitution." *Northern Securities Co. v. United States, 193 U. S. 197, 350.*

Sections 607 and 609 providing for the repayment were passed pursuant to the Constitution.

In perhaps no other country would a clear right given to a taxpayer by the statutory law of a Nation be nullified by attenuated technicalities. Neither common law nor equity can directly or indirectly repeal or annul a statute which the Federal Constitution declares to be the Supreme Law of the Land.

THE COURT OF CLAIMS WOULD HAVE HAD JURISDICTION OF THE CASE.

Respondent does not question that the Court of Claims would have had jurisdiction of the case. However that Court was not in sympathy with the statute and by various attenuated technicalities, one of which was characterized on the floor of the Senate by the Senator in charge of the bill to repeal it as "preposterous", has rendered a recovery under it virtually impossible. The decisions of the Court of Claims creating this situation and supporting this statement are fully explained in Appendix B of this brief.

THE UNITED STATES BY THE STATUTE CONSENTED TO BE SUED IN THE DISTRICT COURT.

The struggle of the taxpayers against the jurisdictional objections of the Government has been a long but progressive one. This Court said in *Nichols v. United States,*

7 Wall. 122, that the Court of Claims had no jurisdiction in suits arising under the revenue laws but subsequently this case was distinguished upon the grounds fully stated in *Dooley v. United States, 182 U. S. 222.*

The words of the statute granting jurisdiction to the District Court are "concurrent with the Court of Claims". These words were recently considered and explained by this Court. *Bates Mfg. Co. v. United States, 302 U. S. ...., 82 L. ed. 698.*

After discussing the history and background of the Tucker Act the Court said:

> "The erection of barriers to recovery in the District Courts which did not exist in the Court of Claims would have tended to defeat the prime objectives of the Act. Uniformity and equality in substantial rights and privileges—for claimants in both forums—were essential features in the system. Distinctions between the opportunities for recovery afforded in the two forums would have tended to mar the symmetry of the plan and to impair its effective and successful operation. As to substantial rights, Congress evidently meant to give claimants an identical *status* in both Courts where the amount in controversy was included in the jurisdiction of both."

The Tucker Act originally gave "concurrent" jurisdiction in tax suits against the United States to the Court of Claims and to the District Court where the amount did not exceed Ten Thousand Dollars. By *42 Stat. 311,* this Act was amended to give jurisdiction even if the claim exceeded Ten Thousand Dollars "if the Collector of Internal Revenue, by whom such tax, penalty or sum, was collected, is dead at the time such suit or proceeding is commenced". On February 24, 1925, by *43 Stat. 917,* the Act was further amended to give jurisdiction if the Collector was "dead or out of office" at the time the suit was

commenced. These amendments were discussed in *Schwab v. United States, 17 F. (2d) 34 (C. C. A. 7th)*, where the Court said at page *35:*

> "It was upon this well-recognized state of the law that the Congress saw fit to amend this so-called Tucker Act, November 23, 1921. What was the purpose of the amendment? Did Congress intend to limit or to enlarge the jurisdiction of the District Court? What had transpired of which the court might take judicial notice, that would throw light upon this question?
>
> "Between the date of the original Act, March 3, 1887, and the amendment, November 23, 1921, the federal Internal Revenue Tax Laws and the World War had both very largely increased the number of claims of the taxpayers and the citizens of the United States. This court takes judicial notice of the fact that the various revenue acts passed during and immediately after the war gave rise to a multitude of claims, which could not all be promptly heard in the Court of Claims.
>
> "The obstacles which confronted the taxpayer who had paid an excessive tax or a penalty and sought to recover the excess were numerous. And they were multiplied when the internal revenue collector who had collected the tax or penalty died before the suit was brought. These facts are significant, it seems to us, on the question of intent. For they supply the background from which it is fairly inferable that Congress merely intended to enlarge the jurisdiction of the District Court so as to permit claimants to bring suits directly in the District Court when they had paid an excessive tax or penalty. It was, therefore, provided, in case the collector was dead, that these claims might be prosecuted in the District Court, regardless of the amount involved."

It is well-settled that the statute is to receive a liberal construction. This Court, speaking through Mr. Justice Holmes in *United States v. Emery, Byrd, Thayer R. Co.,*

237 U. S. 28, at page *32,* has said that the statute conferring jurisdiction in such suits should be construed liberally and that the argument to the contrary:

> "rests on the inadmissible premise that the great act of justice embodied in the jurisdiction of the Court of Claims is to be construed strictly and read with an adverse eye".

The statute was originally enacted and later amended to remedy a defect in the common law. *Blackstone* in his commentaries on the laws of England *(Cooley, 4th Ed., Vol. 1, at *88)* says:

> "There are three points to be considered in the construction of all remedial statutes: the old law, the mischief and the remedy; this is how the common law stood at the making of the Act; what the remedy was for which the Parliament has provided to cure this mischief. And it is the business of the Judges so to construe the act as to suppress the mischief and advance the remedy."

Another reason why the statute should receive a liberal construction is that the rule of sovereign immunity from suit was imported here from England without consideration that the conditions which gave it birth were entirely inapplicable here. It is an outgrowth of the maxim "The king can do no wrong". As said by this Court in *Langford v. United States, 101 U. S. 341,* this maxim has no place in the American constitutional system. When this rule arose in Europe, the king was the State. He was above the law. The people were subjects. In the United States, on the other hand, the people is the sovereign and not the United States. They created the United States and they could dissolve it if they so desired. They delegated to it, as their agent, some of the powers of sovereignty, others they withheld and still others they expressly prohibited the exercise of.

In *State v. Curran, 12 Ark. 321, 344, 345,* it is said that the immunity of the Government from suit,

> "might have been plausibly challenged, if the question was an open one in the courts of this country, as a sickly exotic in American soil, where government is not prescribed to the people by a superior power, but is merely the organ of their own sovereignty and the creation of laws enacted by themselves, and which derive all their obligatory force from the mutual consent of those who are to render them obedience. Because in the absence of any affirmative law to create exemption from liability, and as between a citizen who created a State Government and that Government, on a question relating to any individual right intended to be secured to that citizen by the institution of that Government, there could be no more reason for refusing the right according to the established forms of law, than there could be for refusing the same way against another corporation that was also created by the people, not by themselves in person, but by the exertion of the organ of their sovereignty, unless it could be shown that they had first delegated certain powers, and then surrender to the Government thus created all their other powers, which is directly in the face of the Bill of Rights."

While the rule that the Government cannot be sued without its consent should never have been established in a democracy inasmuch as it is established any Statute by which the Government consents to be sued should receive the most liberal construction possible to give it.*

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* As said in **Christie Street Commission Co. v. United States, 136 Fed. 326 (C. C. A. 8th):** "The theory that a nation or its government should refuse to submit its controversies with its citizens to the adjudication of impartial tribunals is but the fast receding echo of the rule that the King can do no wrong. * * * The decisions of the Supreme Court upon the specific question before us evidence a constantly increasing tendency to adopt this view."

JURISDICTION IS CONFERRED IF THE COLLECTOR WHO COLLECTED THE TAX WAS OUT OF OFFICE AT THE TIME THE SUIT WAS BEGUN.

The money sued for was originally paid in cash as an overpayment of 1918 taxes. The Collector who collected those taxes was not in office when the suit was begun nor was the Collector who credited that money in ~~1924~~ 1924 to the outlawed 1917 tax in office when suit was begun (R. 3, 13). We submit that under these circumstances, the District Court plainly had jurisdiction of the case. *United States v. Piedmont Mfg. Co., 89 F. (2d) 296 (C. C. A. 4th),* and *United States v. Bertelsen & Peterson Engineering Co., 95 F. (2d) .... (C. C. A. 1st), C. C. H. Tax Service, Para. 9201.* In accord with the conclusions of these learned Courts is the conclusion of District Judges who decided those same cases and also the conclusion of Judge West in the Ohio District Court in *The Reeves Brothers Co. v. United States* (subsequently reversed by the Court below).

THE 1924 CREDIT CONSTITUTED A COLLECTION OF THE 1917 TAX.

All the Circuit Courts of Appeal which have considered the question, have held that a credit of an overpayment for one year to an outlawed tax for another year constitutes a collection of the outlawed tax. The Court below so held in the case at bar and in *United States v. John Gallagher Co., 83 F. (2d) 368.* The Circuit Court of Appeals for the Second Circuit so stated in *Gans SS Line v. Bowers, 82 F. (2d) 181, 183.* However, while these cases hold that the credit constitutes a collection of the tax, they hold it constitutes a collection by the Commissioner and not by the Collector. On the other hand, the

Circuit Court of Appeals for the Fourth Circuit in *United States v. Piedmont Mfg. Co., 89 F. (2d) 296 (C. C. A. 4th),* and the Circuit Court of Appeals for the First Circuit in *United States v. Bertelsen & Peterson Engineering Co., 95 F. (2d) ...., C. C. H. 1938 Tax Service, Para. 9201,* hold that the credit constitutes a collection by the Collector. We submit that the *Piedmont Mfg. Co. case* is the best reasoned of these cases and commend it to the attention of the Court.

However the Court of Claims held in the case of *Parks & Woolson Machine Co. v. United States, 58 F. (2d) 868,* that the credit did not constitute a collection of the outlawed tax, but the Judge who wrote this opinion later stated that it was wrong in his dissenting opinion in the case of *First National Bank of Beaver Falls v. United States, 8 F. Supp. 484, 488,* and the decision of the Court of Claims in the case of *H. & B. American Mach. Co. v. United States, 11 F. Supp. 48,* cited on page 3 of the Government's response to the petition for the writ in this case, is utterly inconsistent with the *Parks & Woolson case.* The *Parks & Woolson case* rests upon construing the word "void" in *Section 609* to be an entire nullity, whereas the context of that section taken in connection with the requirement of *Section 607* that a claim must be filed before the overpayment can be refunded indicates that the word "void" is used in the sense of voidable. This Court also so held in *Stearns Co. v. United States, 291 U. S. 54* at p. *60.*

As Judge West said in *Reeves Bros. v. Routzahn* published in the *1931 C. C. H. Tax Service, Para. 9022:*

> "To construe the word 'void' as defendant suggests, would convert what Congress intended as a shield for the taxpayer to a sword for the Government".

The Government appealed that case to the Circuit Court of Appeals and while that Court reversed the case it agreed with Judge. West's construction of the word "void". See *59 F. (2d) 915, 917;* see also *Windfall Grain Co., 23 B. T. A. 725.*

In the *Michigan Law Review, Vol. 32, P. 1088 (No. 8), June, 1934,* there is an excellent article entitled "The Varying Meaning and Legal Effect of the Word 'Void' ", and the decisions cited and considered in this article abundantly sustain the conclusion that the Court below's construction of "void", in conflict with the conclusion of the Court of Claims, is correct and sustain the dissenting opinion of Judge Littleton, *8 F. Supp. 484, 488,* wherein he admits that he was wrong in his construction of "void" in his prior decision in the *Parks & Woolson case.*

It may also be mentioned that the Court of Claims allows interest on such credits. (See *7 F. Supp. 600.)* If they were an utter nullity, how could any interest be allowed thereon?

In *Ewell v. Daggs, 108 U. S. 143, 148-149,* this Court said:

> "It is quite true that the usury statute referred to declares the contract of loan, so far as the whole interest is concerned, to be void and of no effect. But these words are often used in statutes and legal documents, such as deeds, leases, bonds, mortgages and others, in the sense of voidable merely, that is, capable of being avoided, and not as meaning that the act of transaction is absolutely a nullity, as if it never had existed, incapable of giving rise to any rights or obligations under any circumstances."

To the same effect see *Weeks v. Bridgeman, 159 U. S. 541, 547; Louisville Trust Co. v. Comingor, 184 U. S. 18, 25; Ramsay v. Crevlin, 254 Fed. 815.*

> "It is rarely that things are wholly void and without force and effect as to all persons and for all purposes, and incapable of being made otherwise. Things are voidable which are valid and effectual until they are voided by some act; while things are often said to be void which are without validity until confirmed." *Weeks v. Bridgeman, 159 U. S. 541, 547.*

As supporting this same construction see *United States v. Steamship Co., 239 U. S. 88,* from which we also quote:

> "Even when a statute in so many words declares a transaction void for want of certain forms, the party for whose protection the requirement is made often may waive it, void being held to mean only voidable at the party's choice."

THE 1924 CREDIT WAS A COLLECTION BY THE COLLECTOR.

The Commissioner of Internal Revenue is not authorized to collect taxes. As said in *Heinemann Chemical Co. v. United States, 92 F. (2d) 302, 304 (C. C. A. 3rd):*

> "It further appears that collectors of internal revenue are the only persons expressly authorized to collect taxes. *Section 3183 of the Revised Statutes* provides that: 'Collection authority—(a) In general; within district. It shall be the duty of the collectors or their deputies, in their respective districts, and they are authorized, to collect all the taxes imposed by law, however the same may be designated.'" *26 U. S. C. A., Sec. 1541 (a).*

See also *U. S. C. A., Title 26, Sec. 1531; R. S. 3182,* which provides that all assessments made by the Commissioner shall be collected by the Collector.

The Collector of Internal Revenue, like the Commissioner, is appointed by the President with the advice and consent of the Senate. *(U. S. C. A., Title 26, Sec. 1731; R. S. 3142.)* Except those officers mentioned in the Constitution all others derive their power from statutory law.

Since no other officer of the United States, except the Collector or his deputies, has any authority to collect taxes it would seem, because of the Collector's actual participation in this collection, it must be held to have been made by him if a collection was made by anyone.

What the Collector does and what the Commissioner does in the case of allowance of a credit is fully set forth in *United States v. Swift & Company, 282 U. S. 468,* at pp. *471* to *473.* This case held that the date of the allowance of the credit was the date upon which the Commissioner signed the final schedule. This decision was repealed by Congress in the Revenue Act of 1932, as to schedules signed after May 28, 1928, to make the date of the signing of the first schedule the date of the allowance of the credit. *(U. S. C., Sec. 1670 (3).)*

The decision of this Court in the case at bar concerning jurisdiction will apply to subsequent situations and it is obvious that when the Commissioner signs the first schedule he cannot know, as stated in *United States v. Swift & Company, 282 U. S. 468, 472,* whether the allowance will result in a refund or a credit. The Collector of Internal Revenue must determine that. The schedule which the Commissioner sends to the Collector is contained on page 20 of the Transcript and if the Court will now look at that it will be obvious that it is the Collector who determines, not only to what years additional tax an overpayment allowed is to be credited, but it is the Collector who

is also required to determine and who does determine if there are "taxes due, if any" from the taxpayer. The Commissioner relies upon the Collector's certification. The tax returns are filed in the Collector's office. He knows the date of filing of the return and he knew that the Statute of Limitations had run five years after that date. The fact that five years had elapsed was enough to put him on inquiry concerning whether waivers had been signed by the taxpayer. Nevertheless in the case at bar he undertook to decide the taxpayer owed taxes for 1917 and to credit the overpayment to those taxes. An outlawed tax is not owing because the liability for it is extinguished by the statute under the rule of *Davis v. Mills, 194 U. S. 450, 454.* See also *37 C. J., Sec. 51, p. 732; 17 R. C. L., Sec. 318, p. 952,* which state the general rule of law applicable here. It was so stated in *Mascot Oil Co. v. United States, 282 U. S. 434,* at page *437**.

> "The Commissioner, when he forwarded these papers to the Collector, had no way of knowing whether the overassessment would bring about an abatement of taxes theretofore assessed and unpaid, or would result in an overpayment by the taxpayer. This could only be ascertained by the Collector from the books and records kept by him. *Moreover, after the Collector ascertained whether an overpayment resulted, he would have to determine from his books and records the further question whether such overpayment should be applied as a credit on taxes due or in the absence of any taxes due, ought to be refunded."* (Italics ours.) U.S. vs. Swift & Co., 282 U.S. 468, 472.

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*"At the time the taxes were collected, there was no liability on the part of the taxpayer, but this was also true in the case of the petitioners in **Graham v. Goodcell, supra.**" In **Graham v. Goodcell,** as in the case at bar, the collection was made before the 1926 Act was enacted.

Thus it was the Collector's erroneous determination taxes were due and the crediting of the overpayment against these taxes which deprived the taxpayer of its money. The Collector had more to do with the taxpayer's loss than the Commissioner.

It is submitted that this constitutes as much a collection by the Collector as when some clerk in his office stamps on the back of a taxpayer's check "Pay to the Treasurer of United States or Order" and deposits it in the Federal Reserve Bank. In neither case does the Collector receive any cash. In addition to what is said in *United States v. Piedmont Mfg. Co.*, see also *Peerless Paper Box Mfg. Co. v. Routzahn, 22 F. (2d) 459, 460.*

In *Routzahn v. Landesman Hirshheimer Co. (D. C. N. D., Ohio)*, published in *Prentice Hall Tax Service for 1931 in Para 499, at p. 645* (Appeal dismissed, *51 F. (2d) 1083)*, the Court said:

> *"Sec. 842, Title 28, U. S. C. (R. S. 989)* contemplates, if it does not create, liability of a collector for acts done or moneys collected by him, when the same are illegal and cause loss to the taxpayer, regardless of the fact that he was acting under instructions or attempting to perform his duty. *Arnson v. Murphy, 109 U. S. 283, 3 S. Ct. 184 (4 Am. Fed. Tax Rep. 4611); Detroit Hotel Co. v. Brady, 272 Fed. 995-8 (2 Am. Fed. Tax Rep. 1545).* If he is so liable for an innocent exaction of more than is due as shown by a tax return or certificate of the Commissioner, even after he has paid the money into the Treasury, I see no reason to doubt liability in a case like this. *Defendant took an essential part in an act or series of acts which illegally deprived plaintiff of its money,* and whether the ground of illegality be that the statute had run against collection or some other reason, the defendant's liability under the statute should be the same.

> The application of the credits against an excessive tax amounted to its collection. *Boston Pressed Metal Co. v. United States, 42 F. (2d) 313, 314 (8 Am. Fed. Rep. 11132); Brady v. United States, 24 F. (2d) 205 (6 Am. Fed. Tax Rep. 7291); Swift & Co. v. United States, 68 Ct. of Cls. 97 (7 Am. Fed. Tax Rep. 9085.)"*

The question of the nature of an action against a Collector has been considered by this Court in *George Moore Ice Cream Co. v. Rose, 289 U. S. 373,* at pages *380* to *383* therein. What is there said as to the nature of an action against the Collector is in harmony with our contention under this point and not in harmony with the contention of the Government. It is there pointed out that an action against a Collector "is merely a remedial expedient for bringing the Government into Court".

That a tax is paid by a credit of an overpayment for one year to a deficiency for another year is established by *United States v. Swift & Company, 282 U. S. 468.*

The statute commands that an overpayment shall be credited against a deficiency, but this must be read in connection with the statute making it the duty of the Collector and of the Collector alone, to collect a deficiency assessed by the Commissioner and also in connection with the statute directing the Collector to see that all laws and regulations relating to the collection of internal revenue taxes are faithfully executed.

In the case at bar the Collector did not carry out the instructions of the Commissioner appearing on the schedule of overassessments. These instructions were to credit the overpayment against "taxes due, if any". They were not to credit the overpayment against taxes which were

not due and the 1917 tax, against which the Collector credited the overpayment, was not due because it was extinguished by the statute of limitations.

THIS SUIT MAY BE SUSTAINED AS ONE TO RECOVER THE 1918 TAX.

Pollock & Maitland in their *History of the Law of England* state (see pages *558* to *573; 151; 225)* that in the medieval days of the law, if a suitor took out the wrong writ he lost his action although he may have been entitled to recover on the facts either by the common or the statutory law. That condition was no credit to the law and it has been long abandoned. Forms of action have been abolished in all the code States, including Ohio.

As said by this Court in *Bemis Bros. Bag Co. v. United States, 289 U. S. 28, 34:*

> "The rule is now general that at a trial upon the merits the suitor shall have the relief appropriate to the facts that he has pleaded, whether he has prayed for it or not".

The Court below did not consider this angle of the case for the reason that it held the credit constituted a collection of the 1917 tax and that the remedy of the taxpayer was by suit to recover the 1917 tax and that although the decision it cited held a taxpayer entitled to recover it held there was no jurisdiction to allow this plain right.

The petition (R. 1-13) can be construed as a suit to recover the 1918 overpayment of $11,230.14. Because it alleges that this money was not paid to it, it was not a suit on an account stated. *Untermyer v. Bowers, 79 F. (2d) 9, 11 (C. C. A. 2nd),* which cites the *Restatement of the Law of Contracts.*

Although it did not allege the filing of a timely 1918 refund claim it did allege facts from which the law presumed the filing of a timely 1918 refund claim. No demurrer or other objection was made to it. It alleged the date of filing the 1918 return was October 31, 1918 (R. 2), and it alleged facts showing that the Commissioner allowed the 1918 overpayment on May 10, 1924 (R. 2). Inasmuch as this was more than five years after the 1918 return was filed the allowance by the Commissioner would have been illegal in the absence of a timely 1918 refund claim. As said in *Stearns Company v. United States, 291 U. S. 54,* at p. *63:*

> "Acts done by a public officer which presuppose the existence of other acts to make them legally operative are presumptive proof of the latter." (Citing many cases.)

The decision of the Court of Claims in the case of *Pratt & Whitney Co. v. United States, 6 F. Supp. 574, 576,* holding that the allowance of the credit constitutes a rejection of the 1918 refund claim is a bar to recovery on this theory if it is correct because the suit was not brought within two years of the allowance of the credit.

It is submitted that this decision of the Court of Claims is not only incorrect and unreasonable but is contrary to the decision of this Court in *Bonwit Teller & Co. v. United States, 283 U. S. 258.*

In *Bonwit Teller & Co. v. United States, 283 U. S. 258,* it appears from the Findings of Fact that the credit was made between the date the first schedule was signed on March 8, 1927, and the date of the delivery of the Certificate of Overassessment to the taxpayer on May 12, 1927 (See *39 F. (2d) 730,* p. *733),* that suit was filed January 7, 1928. There are no forms of pleading in the Court of Claims. *(Bull v. United States, 295 U. S. 263.)* Hence,

if the credit was a disallowance of the refused claim (as the Court of Claims holds), then the *Bonwit Teller & Co.* suit was in time as an internal-revenue suit because it was filed within two years of disallowance. This Court, however, said in *283 U. S.* at page *265:*

> "This case is not within the clause giving two years after disallowance because here the claim was allowed".

In the case of *Gans Steamship Line v. United States,* reported in *1936 C. C. H., par. 9254,* the District Court in New York said with reference to the same situation:

> "As I read the opinion of Mr. Justice Butler in *Bonwit Teller & Co. v. United States, 283 U. S. 258,* this case does not come within the two years after disallowance because the claim here, as there, was allowed. The Court said:
>
> > 'This case is not within the clause giving two years after disallowance, because here the claim was allowed.' "

Furthermore, the Court of Claims itself in the case of *Consolidated Paper Co. v. United States, 59 F. (2d) 281,* said at p. *289:*

> "In reality the allowance of a credit is the allowance of a refund. In either case that which is allowed is an overpayment. When a credit is allowed there is technically and legally the allowance of a refund, but instead of paying the same by check, the amount thereof is applied in satisfaction of a tax due the Government by the particular taxpayer for another year or period."

Furthermore, the allowance of the refund claim for one year and the credit to another year of the amount allowed could not constitute its disallowance. One of these is the converse of the other. Taxes are computed upon an annual

basis. *(Burnet v. Sanford & Brooks, 283 U. S. 259.* A claim for the year 1918 was filed, considered and allowed. The points made by it were conceded not denied. This money was credited to outlawed taxes for 1917 by mutual mistake of law. (See *Staten Island Hygeia Ice & Cold Storage Co. v. United States, 85 F. (2d) 68,* at p. *71 (C. C. A. 2).*

As stated in *Graham & Foster v. Goodcell, 282 U. S. 409, 417,* it was not until the decision in *Bowers v. New York & A. Lighterage Co., 273 U. S. 346,* decided February 21, 1927, that the Treasury Department knew there was any limitation on its right to collect a tax by distraint. It was not until January 2, 1929, when *Russell v. United States, 278 U. S. 1,* was decided (reversing the Circuit Court of Appeals), that it was determined this rule had not been changed retroactively by the Revenue Act of 1924. It was not until the decision in *United States v. Swift & Company, 68 Ct. Cl. 97,* decided May 6, 1929, affirmed by this Court February 1, 1931, *282 U. S. 468,* almost ~~more than~~ a year after this suit was begun, that it was determined this particular credit involved here was made too late. That decision settled the date upon which a credit was made. Consequently the Commissioner did not know, as stated in his letter (R. 21) that the credit was outlawed.

The taxpayers likewise did not know that the tax was outlawed and that there was no right to make the credit. Indeed, the Court of Claims held in *Toxaway Mills v. United States, 61 Ct. Cl. 363,* that a taxpayer had no right to recover an outlawed tax because of the provisions of *Section 1106 (a) of the Revenue Act of 1926.* It was not until the 1928 Act was passed that the taxpayers' right to recover the credit was clearly established.

The entire trend of modern authority is to put mistakes of law on the same basis as mistakes of fact. *Williston, Contracts (2d Ed.), Sec. 1581; Pomeroy, Equity Jurisprudence (4th Ed.), Sec. 849.* See also, *Cooper v. Phibbs, L. R. 2 H. L. 149, 170; Lansdowne v. Lansdowne, 2 Jac. & W. 205; Reggio v. Warren, 207 Mass. 525, 536, 93 N. E. 805, 32 L. R. A. (N. S.) 340, 20 Ann. Cas. 1244; Order of United Commercial Travelers v. McAdam, 125 F. 358, 368 (C. C. A. 8).*

The conclusion of the Court of Claims that the allowance and credit of a 1918 overpayment to a 1917 tax (made under such mutual mistake) constitutes a rejection of the 1918 refund claim is in conflict with obvious reason. Suppose Your Honor put in a claim against a man of $100.00 for 1918 and he said, "Your claim is just and I hereby allow it, but I will credit it against a debt due from you for 1917". Manifestly, this would not constitute a rejection of your 1918 claim, and under a Court pleading setting up these facts, the sole issue would be whether he had the right to credit it on your alleged 1917 debt. So it is in the case at bar.

The Commissioner of Internal Revenue never claimed that the credit of the 1918 overpayment to the 1917 tax constituted a rejection of the 1918 refund claim. Indeed, he did not reject and refuse to pay the 1918 refund claim until he issued his letter June 29, 1929 (R. 21) and this suit was filed within two years thereafter.

After the discovery of the mistake which led to the credit and after intensive consideration and hearings, Congress in 1928 enacted *Sections 607 and 609 of the Revenue Act of 1928,* providing for the return of such money to taxpayers. If the Court of Claims is right in holding

the allowance of a credit constitutes the rejection of a refund claim, then these provisions of the law have no effect whatever because except in a few isolated cases taxpayers, due to the mutual mistake, did not bring any suit within two years of the date of the credit. These sections were mainly concerned with assessments made prior to June 2, 1924, because as to assessments made after that date the Revenue Act of 1924 allowed six years after the date of assessment within which to collect them and such assessments were not barred when the 1928 Act was enacted so that the only assessments which could be affected by the express retroactive provisions of *Sections 607 and 608* were those made prior to June 2, 1924. As to such assessments, if the decision of the Court of Claims is sound, it erases this legislation (passed for the benefit of taxpayers) from the books. (See Appendix B hereof.)

CONSEQUENCES OF HOLDING TAXPAYER'S SOLE REMEDY IN CASE OF A CREDIT COLLECTION IS IN THE COURT OF CLAIMS.

If it should be held that in case of a credit collection taxpayer's sole remedy is in the Court of Claims, then Congress will be compelled to amend the law. Otherwise thousands of cases will be forced into the Court of Claims. Taxpayers from Alaska to Florida will be obliged to go there. That Court can hardly escape being soon flooded with litigation growing out of the contracts the Government has made as a result of its activities to combat the depression. This will bring about the delay in the hearing of cases along with the inconvenience of compelling taxpayers located at a distance to sue in Washington. The report of the Commissioner of Internal Revenue for the fiscal year ended June 30, 1937, shows, on page 6 thereof,

that 15,257,987 tax returns were filed in offices of Collectors of Internal Revenue during that fiscal year.

Whatever ruling is made in this case will apply not only to income taxes but to Social Security taxes and other various excise taxes. If the Government claims a taxpayer owes Fifty Thousand Dollars for one year and has made an overpayment of Five Thousand Dollars for another year, it will collect Forty-five Thousand Dollars from him in cash and credit the other Five Thousand Dollars, but if he wants to sue for the entire amount he will have to go to the Court of Claims if it is here held the District Court has no jurisdiction in case of a credit.

CONCLUSION.

The case of *United States v. Swift & Company, 282 U. S. 468,* establishes that a collection is made by crediting an overpayment for one year to a deficiency for another year. No distinction should be made in the case of a credit declared by *Section 609* to be "void" because that word has been construed to mean voidable at the taxpayer's option. *Stearns Company v. United States, 291 U. S. 54,* at p. *60.* See also the decision of the Court below in the case at bar.

However, if the credit did not constitute a collection in 1917 tax, then the suit may be sustained as a suit to recover the 1918 overpayment because it was brought within two years from the first rejection by the Commissioner of the taxpayer's 1918 refund claim (R. 21).

If the credit was a collection of the 1917 tax then jurisdiction should be sustained because the rule of sovereign immunity from suit was referred to in *George Moore Ice*

Cram Co. v. Rose, 289 U. S. 373, 382, as "a relic of obsolete modes of thought" and the Statute whereby the United States has consented to be sued must receive a very liberal construction. This point was overlooked by the Court below which gave it a strict construction.

That a literal construction will sustain the jurisdiction is evidenced by the fact that ten able and experienced federal Judges have so held. (Two Circuit Courts of Appeal by unanimous decisions—*United States v. Piedmont Mfg. Co., 89 F. (2d) 296 (C. C. A. 4th). United States v. Bertelsen & Peterson Engineering Co., 95 F. (2d) ...., (C. C. A. 1st);* the two District Court Judges in those cases. Also District Judge West in *Reeves Brothers Co. v. United States* and District Judge Hulbert in *Gans S. S. Line v. United States,* published in *1936 C. C. H. Tax Service, par. 9254.)*

In this connection it may be mentioned that the case of *Iron Cap Copper Co. v. United States, 282 U. S. 476,* was a suit in the District Court to recover $11,592.18 interest (see *39 F. (2d) 560,* at page *562)* and all Courts including this Court assumed jurisdiction existed.

For the foregoing reasons the decision below should be reversed.

All of which is respectfully submitted.

JOHN E. HUGHES,
JAMES B. O'DONNELL,
WILLIAM COGGER,
Counsel for Petitioner.

APPENDIX A.

HISTORY OF SECTIONS 607 AND 609 REVENUE ACT OF 1928.

The Treasury Department thought there was no limitation on its right to collect a tax by distraint and published a public ruling so holding. (See *Graham & Foster v. Goodcell, 282 U. S. 409,* at page *417.)* This Court held otherwise in *Bowers v. New York & Albany Lighterage Co., 273 U. S. 346* (decided February 21, 1927). It thus appeared that hundreds of collections had been made too late. The Treasury asked Congress to prevent their refund and the taxpayers presented to Congress the contrary view.

Congress compromised the matter by ordering the refund of the money in all cases except where a claim in abatement had been filed. At first the Senate refused to agree to this exception but finally agreed to it in conference. This exception does not obtain in the case at bar. Its history is set forth in *Graham & Foster v. Goodcell, 282 U. S. 409,* which upheld the exception. This legislation providing for the refund of the money was the result of extensive consideration and hearings by both the House and Senate Committees.

The reports by the Congressional Committees upon the Revenue Bill of 1928 uncontrovertibly show that it was intended that credits of overpayments against barred deficiencies should be refunded. The report of the Ways and

Means Committee (70th Congress, 1st Session, Report No. 2, page 33) stated that *Section 1106-A of the 1926 Act* had failed to resolve many doubtful questions as to the legal effect which follows the expiration of the period of limitations prescribed for the assessment and collection of a tax, and that *Section 1106-A* was repealed as of its effective date and replaced by *Sections 607 to 610* of the new Bill. The report further stated that *Section 607* provided that regardless of the correct tax liability any payment shall be an overpayment if made after the period of limitation on assessment. The report further stated that *Section 609* provided that the credit of an overpayment against the barred deficiency shall be void if a payment of the deficiency would constitute an overpayment under *Section 607* and the report further stated that an overpayment under *Section 607* is to be credited or refunded the same as any other overpayment. The statements in the report of the Finance Committee *(70th Congress, 1st Session, Senate Report No. 960)* were to the same effect and in substantially the same language. The Senate Finance Committee added the statement that any overpayment shall be credited or refunded only if claim therefor is filed within the proper period of limitation.

APPENDIX B.

How The Decisions Of The Court Of Claims Have Nullified The Rights Given Taxpayers By Sections 607 and 609 Of The Statute.

The Court of Claims has not been in sympathy with actions by taxpayers to recover outlawed collections and has virtually nullified the command of Congress that such collections or credits be refunded to taxpayers.

In *Toxaway Mills v. United States (61 Ct. Cl. 363)*, it held the Statute of Limitations merely barred the remedy and if the Government got the money it could keep it. If this view was sound it made it useless for Congress to put a Statute of Limitations in a Revenue Act because the taxpayer could not enjoin collection under *Graham v. Dupont (262 U. S. 234)*. Solicitor General Mitchell, a great and candid lawyer, admitted this decision was utterly unsound and this Court granted *certiorari. (270 U. S. 637.)* When this decision of the Court of Claims was brought to the attention of Congress it considered it "preposterous" and decided to repeal it by legislation. Accordingly, it enacted *Section 1106 (a) of the Revenue Act of 1926* declaring that the statute should not merely bar the remedy but should extinguish the liability.

In support of this amendment, Senator Reed made the following statement *(Congressional Record, Volume 67, Part IV, page 3531)*:

> "Mr. President, just a word in explanation of this amendment. The necessity for it arises from a very

peculiar case. In a recent decision in the Court of Claims it has been held, in substance, that after the statute of limitations has run against the collection of a tax, the Collector may nevertheless issue his distraint, and collect the tax by a distraint, and then if the taxpayer brings suit against the United States to recover it back, he, being the plaintiff, cannot plead the statute of limitations, although the United States would have been barred from a suit for the tax because the statute had run. It is a preposterous result, it seems to me, and a very great hardship to the taxpayer, to allow such a condition to continue, and while I feel reasonably confident, with all respect to the Court of Claims, that the case will be reversed on appeal, I do not think we ought to allow even a possibility that it will not remain, and we ought to correct it now."

The Report of the House Conferees, who reported out the amendment in its final form, contained the following explanation:

> "This amendment is deemed advisable because of an opinion in a recent decision of the Court of Claims *(Toxaway Mills v. United States)* although in a case presenting the specific point, this opinion would probably not be followed by the Supreme Court. (See Taft, C. J.; In *Graham v. Dupont, 262 U. S. 234, 256, 258." (House Report No. 356, 69th Congress, First Session, p. 55.)*

After *Section 1106 (a)* was enacted, Solicitor General Mitchell confessed error and this Court reversed the *Toxaway Mills case, 273 U. S. 781.* However, in giving judgment on the mandate, the Court of Claims intimated that if *Section 1106 (a)* had been properly construed it would have barred recovery. See *63 Ct. Cl. 646.* This alarmed taxpayers and to clarify and put beyond doubt the intention of Congress to entitle taxpayers to recover outlawed

credits and payments, it enacted *Sections 607 and 609.* This appeared from the Committee Reports referred to in Appendix A. Because this Court in the case of *Graham & Foster v. Goodcell,* 282 *U. S. 409,* had said that an erroneous credit constituted collection of the tax, the taxpayers sued on that theory, but the Court of Claims in *Parks & Woolson Mach. Co. v. United States, 58 F. (2d) 868, cer. den. 287 U. S. 634,* held that such a credit did not constitute a collection.

In opposing the petition for the writ of *certiorari* in that case the Government at the bottom of page 5 of its memorandum, made the following statement:

> "Taxpayers are adequately protected in situations like the present, since the certificate of overassessment amounts to an account stated against the United States. *(Bonwit, Teller & Co. v. United States, supra.)* Recovery may be had upon the issuance of such a certificate even though the amount set forth therein has been erroneously credited on a tax liability barred by the statute of limitations. The credit in such a case would be void and should not affect recovery."

The taxpayers then sued in the Court of Claims on accounts stated, taking the Government at its word, but the Court of Claims repeatedly and consistently held that there was no account stated in such case. *Leisenring v. United States, 3 F. Supp. 853,* and numerous cases which follow it and which appear by reference to the citator. Although, where there was no question of an outlawed tax, the Court of Claims has gone to great lengths in establishing accounts stated, it has consistently failed to hold that there was an account stated in a suit to recover an outlawed tax. Finally it reached the conclusion that not only was there no account stated in such case but that there was an account settled. *First National Bank of*

Beaver Falls, 8 F. Supp. 484, 487, and hence taxpayers were concluded.

When the taxpayers countered with the only claim left, that they were suing for the original overpayment instead of for the credit, the Court held that the making of a credit constituted a rejection of the refund claim and as none of these suits had been brought within two years of the date of rejection, which incidentally in the majority of cases was more than two years before the Revenue Act of 1927 was enacted, they were all barred.

Thus was a clear right given the taxpayers of a Nation by a law of Congress enacted pursuant to the Constitution and which the Constitution itself declared constituted the supreme law of the land, whittled away and destroyed by what was apparently the superior law of the attenuated technicalities—which, it is respectfully submitted, were all unsound.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1937.

No. 864.

LOWE BROTHERS COMPANY, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

REPLY BRIEF FOR PETITIONER.

JOHN E. HUGHES,
First National Bank Bldg.,
Chicago, Illinois.

JAMES B. O'DONNELL,
Carew Tower,
Cincinnati, Ohio.

WILLIAM COGGER,
315 Evening Star Bldg.,
Washington D, C.
Counsel for Petitioner.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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REPLY BRIEF FOR PETITIONER.

Certain new points made in respondent's brief make it advisable to file this reply brief.

THE DEFENSE THAT THERE WAS AN ACCOUNT SETTLED WAS NOT MADE BY RESPONDENT UNTIL THE FILING OF ITS BRIEF IN THIS COURT.

On page 15 of its brief, respondent argues that there was an account settled which bars recovery. No such defense was made in the District Court or in the Circuit Court of Appeals. No such affirmative defense was pleaded in the answer of defendant. (R. 11 to 14.)

If this defense had been pleaded it could easily have been met. It is true, as respondent states, that on May 2, 1924, the taxpayer paid $20,541.63 in cash, being the balance of the 1917 deficiency after the credit here sued for (R. 25). It is also true, as the Government well knows, that the petitioner filed a timely claim for the refund of this $20,541.63 paid for 1917 on the ground that it was an overpayment under section 607 and the respondent refunded this money to the petitioner. If respondent had considered that there was an account settled it would not have done this. The reason this fact was not proved on the trial was because no such defense was pleaded or suggested. The respondent was as fully aware of this fact as was the plaintiff. The statute declared in express words this money was an overpayment and expressly allowed the taxpayer four years to object to it by filing a refund claim. The taxpayer made the statutory objection in the statutory manner and in the statutory time and the defendant promptly refunded the cash. The only reason it did not refund the sum collected by credit is stated in its letter of January 29, 1929 (R. 21), wherein it contends that the credit was made when the first schedule was signed. As pointed out at page 27 of our main brief, the Court of Claims did not decide this contention adversely to the respondent until May 6, 1929, and this Court did not affirm that decision until February 1, 1931.

Furthermore, there could not be an account settled in this case for the reason stated by Judge Hand in *Untermyer* v. *Bowers*, 79 F. (2d) 9, 11 (C. C. A. 2nd) quoting Restatement of the Law of Contracts. The reason the taxpayer did not object at the time the credit was made was because the credit was made by mutual mistake of law. Neither of the parties knew that the right to make it was barred. In such circumstances petitioner could not be expected to object at the time. The case of *Stearns Company* v. *United States*, 291 U. S. 54, is distinguishable because the taxpayer there, unlike the taxpayer here, did not

file a claim for refund within four years of the date of the cash payment or of the date of credit. This is stated by the Court at the bottom of page 66 of that case. The suit there was the suit on an account stated while here the suit is to recover an overpayment of tax and not on an account stated. Furthermore, in the Stearns case this Court held that the filing of a claim for credit estopped the taxpayer to recover. There is no claim for credit here. While the Stearns case is not applicable here, yet it is respectfully submitted that it went too far because it permitted an equitable defense to repeal or at least write an exception into the express provision of a statute. The very exception which that decision read into the statute was placed in it by the Senate at the request of the Treasury Department but the House refused to agree to it and it was stricken out in conference. In other words Congress, after deliberate consideration, expressly refused to enact the exception which that decision subsequently read into the law. For the history of legislative proceedings, which show this see the dissenting opinion of Judge Littleton in *Naumkeag Steam Cotton Company* v. *United States*, 2 Fed. Supp. 126 at p. 152.

THE DEFENSE THAT THE COMMISSIONER DID NOT HAVE AUTHORITY TO ALLOW A 1918 OVERPAYMENT IS MADE FOR THE FIRST TIME IN THIS COURT.

Another defense made for the first time in this Court is that the Commissioner did not have authority to allow the 1918 overpayment. The acts of public officers are presumed to be regular and in the absence of an express showing to the contrary it must be presumed that the Commissioner's action in allowing the 1918 overpayment was proper. No such defense was made in the answer of defendant (R. 11 to 14) or in either of the Courts below. If it had been made petitioner would have had an opportunity

to and could have met it. In the absence of an affirmative showing rebutting it in this particular the presumption of regularity must prevail. (See our main brief page 25.)

VIEWING THE ACTION AS ONE TO RECOVER A 1917 OVERPAYMENT THE APPLICABLE PROVISIONS OF THE STATUTE WERE COMPLIED WITH.

In the statement of facts in respondent's brief it is correctly stated that the Collector made the credit April 24, 1924, and it was approved by the Commissioner on May 10, 1924. The statute of limitations on the right to make it expired with the waivers on April 1, 1924. (R. 38) See also *Aiken* v. *Burnet,* 282 U. S. 277 at p. 279. The claim for 1917 tax was filed April 2, 1928, within four years of the date of the credit, was rejected February 1, 1929, and suit was filed May 24, 1930. Thus, if the credit in 1924 of the 1918 overpayment to the 1917 tax constituted a payment of the 1917 tax, both the claim for that 1917 tax and this suit were unquestionably filed in time.

THE BASIS OF THE HOLDING THAT THE CREDIT CONSTITUTED A COLLECTION OF THE 1917 TAX.

In *Boston Pressed Metal Co.* v. *United States,* 42 F. (2d) 313, the taxpayer contended that it was suing for a 1918 overpayment which was credited to an outlawed tax for 1917, the collection of which had been stayed by a claim in abatement. The taxpayer contended that the credit was void and did not constitute a collection of the 1917 tax and hence, the collection of the 1917 tax was not stayed by a claim in abatement and recovery was not prevented by the provisions of Section 611 of the Revenue Act of 1928. The Court of Claims rejected this contention. In 42 F. (2d) 312 at page 313, it quoted Section 609 (in issue in the case at bar) and then said concerning taxpayer's contention:

> "We do not think this contention is well founded, but consider it clear that under the express language of

> section 609 the credit is treated as a 'payment in respect of such liability' against which ('against the liability') the credit is taken. When the collector applied part of the money, which was due on the refund, to another tax, the relation of plaintiff and defendant to the transaction so far as this question is concerned was in law the same as if the collector had received cash from the plaintiff; and by the express language of section 609 the question of whether it is to be considered an overpayment, and hence recoverable, is to be determined under section 607, which in turn under its provisions depends on section 611."

This court granted certiorari and the taxpayer advanced the same contention in this court. This court rejected that contention in 282 U. S. 409, at page 424, in these words:

> "There is also a contention that section 611 does not apply when the tax was paid by the credit of the amount of an overpayment for another taxable year. But the application of a credit against an assessment at a time when collection was barred must be regarded as an erroneous collection, and we see no reason for taking such a case out of the statute."

It is because of this statement that the courts below have held the credit of an overpayment for one year to an outlawed tax for another year constitutes an erroneous collection of said outlawed tax.

THE 1917 TAX WAS COLLECTED BY THE COLLECTOR WHO MADE THE CREDIT.

It cannot be denied that the only officer of the United States authorized to collect taxes is the Collector of Internal Revenue (or his deputies).

The statute quoted on page 5 of our main brief and on page 18 of respondent's brief is the only statute in existence dealing with credits. (So stated in L. O. 1106, C. B. 1-2, p. 221.) This statute does not say who shall make the credit. Neither does any other statute. We have examined the statutory law for any provision that the Commis-

sioner is to make the credit but have found none. By 26 U. S. C. Section 1670 (R. S. 3220) the Commissioner is authorized "to remit, refund and pay back all taxes erroneously or illegally assessed or collected." Each tax year is a separate compartment and a remission of taxes overpaid for one year is different than the credit of the amount so remitted to collect taxes for another and different year.

Furthermore, when the Commissioner signs the first schedule he cannot know, as expressly stated by this Court (for quotation see our main brief page 21) whether the taxes remitted will be credited. The government stated in its brief in this Court in the Swift case that the signing of a second schedule was discontinued after January, 1927, and the second schedule is no longer important because since the Swift decision, Congress, as stated in our main brief, has enacted a statute providing that the date of the signing of the first schedule shall govern in case of schedules signed after May 28, 1928. To hold that the Commissioner has collected the taxes in the face of a statute authorizing only the Collector to collect taxes and in the absence of any statute expressly declaring that the Commissioner shall do other than determine whether taxes have been overpaid for any year, is to resolve the doubt both against the taxpayer and to adopt a strict construction of the statute conferring jurisdiction instead of the liberal construction to which it is entitled. The result of such a holding is to split the jurisdiction in the many cases in which part of a liability is collected in cash and part by credit for in a suit for the cash collected there can be no question about the right of the taxpayer to sue in the District Court for the cash.

THE WORD "VOID" IN SECTION 609 SHOULD BE CONSTRUED TO MEAN VOIDABLE.

At pages 10 to 13 of its brief respondent argues that the word "void" in section 609(a) should be construed to mean "the attempted credit is a nullity" and hence it follows that the taxpayer has an action, if at all, for 1918. It couples this with the argument (Br. p. 12) that the making of the credit constituted a rejection of the 1918 refund claim and hence the taxpayer's action is barred.

As pointed out at pages 28 and 29 of our main brief, the effect of the adoption of such a construction will be to nullify and defeat the purpose of the statute. Also the effect of such a construction in cases such as this where part of a deficiency is paid by cash and part by credit is to split the cause of action into one for each of two different years. Unquestionably this taxpayer had a cause of action for the year 1917 for the cash payment yet if the construction contended for by the Government be adopted its cause of action for the credit will be for the year 1918. Both of these things grow out of a single transaction and it is submitted that the incongruous result of splitting the cause of action into a cause of action for each of two different years should not be reached. In each case the complaint is the same, viz., that the transaction was outlawed.

Furthermore it cannot be contended by the Government that the credit was "void" from the time it was made in 1924 to May 29, 1928, when the Revenue Act of 1928 was enacted. The sole purpose of Congress in enacting Section 609(a) was to make certain that the taxpayer would get a refund of outlawed credits. It has not been and cannot reasonably be suggested that it had any other purpose. The section must be construed liberally to effectuate its purpose. Such a construction as that contended for by the government will nullify it if it is also held, as the government contends, that the making of the credit constitutes a rejection of the 1918 refund claim. The case of *Bertelsen & Peterson, Engineering Co.* (as explained at page 13 of the govern-

ment's brief) is contrary to this contention of the government for there the credit was allowed in 1926 and suit was not filed until 1929.

IF RESPONDENT'S VIEW AS TO 1917 BE ADOPTED THE SUIT MAY BE SUSTAINED AS ONE TO RECOVER A 1918 TAX OVERPAYMENT.

On page 14 of its brief the government states plaintiff's counsel "indicated in open court at the time of the trial that plaintiff relied upon the petition as setting out a case for refund of overpayment of tax for the period ended September 30, 1917" and cannot now claim it states a case for 1918.

It is axiomatic that the case stated by the petitioner must be determined by the petition alone and not by oral statements of counsel in court not appearing of record.

It must be remembered that the government did not challenge the jurisdiction in the District Court but first did this in the Court of Appeals.

The case was tried in the District Court February 15, 1933 (R. 30). The Circuit Court of Appeals for that Circuit had held in *Routzahn* v. *Reeves Brothers Co.*, 59 F. (2d) 915, 917, decided June 29, 1932, that the credit was a payment of the 1917 taxes. Petitoner's counsel could not be expected to take a position in the District Court contrary to its Court of Appeals. However if the contention here made by the government that the Court of Appeals view the credit was a collection of the 1917 tax is wrong, finds favor with this court, then it is submitted petitioner is entitled to offset this by contending that the suit may be considered one for 1918 taxes and so considered the District Court had jurisdiction. The 1918 Collector was out of office when the suit was brought and unquestionably an action could have been brought against him. The contention of the government that a 1918 refund claim is a prerequisite to suit is admitted and answered at page 25 of our main brief.

Furthermore while a claim for refund must be filed before suit (it affirmatively appears one was filed here) it need not

be filed within five years of filing the return. *Western Wheeled Scraper Co.* v. *United States*, 72 F. (2d) 487 (C. C. A. 7th). For example the statute provides a refund shall be made without any claim and regardless of any limitation in case of a reduction of invested capital (Page 18 respondent's brief). In the case of an overpayment found by the Board of Tax Appeals no claim is required if the petition to the Board was filed before the time for filing a claim expired. However in such cases a claim may be required before suit—albeit it be filed more than five years after the return.

However this taxpayer's claim for 1918 had been allowed, not rejected, and it could not sue for 1918 until the claim was rejected. (R. S. 3226 was amended in 1932 to remedy this defect.) Accordingly it renewed its 1918 demand (R. 24) which resulted in its first rejection (R. 21) and within two years thereafter brought this suit.

The suit was a suit to recover an Internal Revenue tax and not a contract suit on an account stated. It did not state a cause of action on an account stated because it did not allege the delivery of a certificate of overassessment to it. *Daube* v. *United States*, 289 U. S. 367, 379. It did not do this because such a suit is a contract suit and not a tax suit and the District Court has no jurisdiction of contract suits against the United States in excess of $10,000.

Even if the Commissioner has allowed the overpayment it does have jurisdiction of a tax suit against a Collector to recover an amount allowed by the Commissioner. *Tucker* v. *Alexander*, 25 F. (2d) 425, 429 (C. C. A. 8th). Indeed the Collector has nothing to do with either the allowance or rejection of a refund and his liability should not depend on something with which he has nothing to do. This phase of the case is completely argued in our main brief.

RESPONDENT'S CASES DISTINGUISHED.

Of the cases cited on page 7 of respondent's brief *Untermyer* v. *Bowers*, 7 F. Supp. 347 was reversed in 79 F. (2d) 9 and the government's petition for certiorari was denied in 296 U. S. 641. *Moses* v. *United States*, 61 F. (2d) 791 and *Gans Steamship Line* v. *United States*, 65 F. (2d) 1016 were not suits to recover Internal Revenue taxes but were contract suits on an account stated. (See the government's response to the taxpayer's petition for certiorari in this Court, page 9 of its memorandum in the Moses case and page 4 in the Gans case.) Later the Gans Company brought another suit for an Internal Revenue tax of which the District Court clearly had jurisdiction and it is this later suit which is quoted from at page 26 of our main brief.

THE RULE OF SOVEREIGN IMMUNITY.

In the last analysis the government's case comes now to a request for a strict construction of the statute granting jurisdiction in favor of the rule of sovereign immunity. The best discussion of how this rule came to be adopted in this country is contained in *United States* v. *Lee*, 106 U. S. 196, at pages 205, 209, which the historian of this court declares is "now regarded as one of the glories of American law." *Warren*, 673, 674.

In many respects a State is more sovereign than the United States. Also the immunity of the United States does not rest on the Constitution or on a statute while the immunity of a State to suit by a citizen rests on the Constitution. Yet this court has held that if a State appears without objection it waives this immunity which is a personal privilege. *Missouri* v. *Fisk*, 290 U. S. 18, 24, while it has held that the immunity of the United States may only be waived by an act of Congress. It is hard to reconcile these holdings. If a State had been a defendant and had made the objection for the first time in the Circuit Court of Appeals

as the United States did here, it would have waived its immunity.

All of which is respectfully submitted.

JOHN E. HUGHES,
First National Bank Bldg.,
Chicago, Illinois.

JAMES B. O'DONNELL,
Carew Tower,
Cincinnati, Ohio.

WILLIAM COGGER,
315 Evening Star Bldg.,
Washington D, C.
Counsel for Petitioner.

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IN THE

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No. 864

LOWE BROTHERS COMPANY, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

SUPPLEMENTAL MEMORANDUM FOR PETITIONER.

JOHN E. HUGHES,
First National Bank Bldg.,
Chicago, Illinois.
Counsel for Petitioner.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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SUPPLEMENTAL MEMORANDUM FOR PETITIONER.

May It Please the Court:

This memorandum is filed with reference to the question of Mr. Justice Butler concerning whether the Court can take judicial notice that the Collector of Internal Revenue who was in office in 1918 was not in office when this suit was filed on May 24, 1930. That the Court can and should take judicial notice of this see *York & M. Line Co.* v. *Winans*, 58 U. S. 30, 41; *Brown* v. *Piper*, 91 U. S. 37, 42; *Keyser* v. *Hitz*, 133 U. S. 138, 146; *Consolidated Gas Co.* v. *Hardy*, 14 F. Supp. 223; *Roth* v. *Baldwin*, 74 F. (2d) 1003, cer. den. 295 U. S. 737; *Anderson* v. *Rohrer*, 3 F. Supp. 367; *United States* v. *Phelps*, 40 F. (2d) 500; *Frischer & Co., Inc.* v. *Bakelite*, 39 F. (2d) 247; *Wigmore on Evidence* (Second Edition) Sec. 2575 and note; *Evidence*, 23 Corpus Juris, Sections 1888, 1889, p. 97. The name of each Collector and

date when he was confirmed by the Senate appears in the Congressional Record.

For convenience in locating these names with dates see the list of Collectors contained under the heading "Personnel" in the C. C. H. 1937 Tax Service, p. 17023. This list is as follows:

OHIO, FIRST COLLECTION DISTRICT.

Andrew C. Gilligan, August 1, 1913-November 30, 1919; Stephen W. McGrath (Acting), December 1, 1919-January 31, 1920; Stephen W. McGrath, February 1, 1920-November 24, 1921; Charles M. Dean, November 25, 1921-September 15, 1927; Thomas M. Taylor (Acting), September 16, 1927-October 16, 1927; Louis J. Huwe, October 17, 1927-August 24, 1933.

Apart from judicial notice it is further submitted that the allegation (R. 3) that the Collector who was in office in 1924 was not in office when the suit was brought is *prima facie* an allegation that the Collector in office in 1918 (six years earlier) was also not in office when the suit was brought just as an allegation that the Chief Justice of this Court in 1924 was not in office in 1930 would be *prima facie* an allegation that the Chief Justice of this Court in 1918 was not in office in 1930. This *prima facie* presumption is subject to rebuttal by showing the abnormal circumstance that although the allegation shows the 1918 Collector resigned before suit was brought, he was later reappointed. This circumstance is abnormal because the Court will take judicial notice that Collectors are political appointees and a different political party was in control of appointments in 1918 than from 1924 to 1932.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

JOHN E. HUGHES,
First National Bank Bldg.,
Chicago, Illinois.
Counsel for Petitioner.

In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 864

LOWE BROTHERS COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

We do not oppose the granting of a writ of certiorari in this case.

The case involves crediting of an overpayment in taxes for the year 1918 against a deficiency in taxes for the year 1917 in the amount of $11,230.14 at a time when the collection of the deficiency was barred by statute. Claim for refund of the 1917 deficiency, allegedly collected by the credit, was thereafter filed, and, upon rejection of the claim, suit was instituted in the District Court against the United States for the recovery of an asserted overpayment of taxes for 1917 in the amount of $11,230.14 (R. 1, 38). The Collector of Internal

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Revenue who was in office at the time the credit was made was out of office at the time suit was instituted (R. 3, 13).

The District Court dismissed the petition on the ground that the application of the sum of $11,-230.14 in suit, arising from overpayment of tax for the year 1918, to the barred tax for the year 1917 was void and consequently did not constitute an overpayment of tax for the year 1917 under the provisions of Section 607 (U. S. C., Title 26, Sec. 1670) of the Revenue Act of 1928, c. 852, 45 Stat. 791, by reason of the restrictive features of Section 609 (U. S. C., Title 26, Sec. 1675) of that Act (R. 30–34, 39): The Circuit Court of Appeals, following its decision in *United States* v. *John Gallagher Co.*, 83 F. (2d) 368, held that this ruling constituted error. However, the court below further held that the judgment of the District Court dismissing the petition must nevertheless be affirmed for lack of jurisdiction in the District Court to entertain the suit, citing its decision in *United States* v. *Reeves Bros. Co.*, 83 F. (2d) 121, and the decision of the Circuit Court of Appeals for the Second Circuit in *Moses* v. *United States*, 61 F. (2d) 791. On this point the theory of the court below is that the jurisdiction conferred upon District Courts to entertain suits against the United States for the recovery of an illegally or erroneously exacted tax in excess of $10,000 is limited to cases where the tax was collected by a Col-

lector of Internal Revenue who is dead or out of office, and that here the tax was not collected by a collector.

The petition for a writ of certiorari alleges that the decision of the court below on the question of the jurisdiction of the District Court is in conflict with the decision of the Circuit Court of Appeals for the Fourth Circuit in *United States* v. *Piedmont Mfg. Co.*, 89 F. (2d) 296. We agree that these decisions may not be distinguished.

The holding of the court below that the District Court erred in ruling that the application of an overpayment of tax for one year against a barred deficiency for another year does not constitute an overpayment of tax for the year of the deficiency conflicts with numerous decisions of the Court of Claims, among which are *Parks & Woolson Mach. Co.* v. *United States,* 58 F. (2d) 868, certiorari denied, 287 U. S. 634; *Rosenstadt & Waller* v. *United States,* 7 F. Supp. 287; and *American Steam Conveyor Corp.* v. *United States,* 10 F. Supp. 571, certiorari denied, 296 U. S. 599. Compare *First Nat. Bank of Beaver Falls* v. *United States,* 8 F. Supp. 484 (C. Cls.), motion for leave to file a second motion for a new trial denied, 9 F. Supp. 424 (C. Cls.), certiorari denied, 294 U. S. 717, and *H & B American Mach. Co.* v. *United States,* 11 F. Supp. 48 (C. Cls.), petition for a writ of certiorari dismissed per stipulation of counsel, 297 U. S. 726, in which latter case the point here dis-

cussed was not raised in the Court of Claims until the filing of a motion for a new trial.

In view of the conflicting decisions, we do not feel justified in opposing the petition for a writ of certiorari.

Respectfully submitted.

ROBERT H. JACKSON,
Solicitor General.

MARCH 1938.

U. S. GOVERNMENT PRINTING OFFICE: 1938

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In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 864

LOWE BROTHERS COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the District Court (R. 30–33) is reported at 8 F. Supp. 1016. The memorandum opinion of the Circuit Court of Appeals (R. 48–49) is reported at 92 F. (2d) 905.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered November 11, 1937 (R. 47). Petition for rehearing was denied December 17, 1937 (R. 55). Petition for writ of certiorari was filed March 14, 1938, and was granted April 11, 1938 (R. 56). The jurisdiction of this Court is invoked under

Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether a United States District Court under the provisions of Section 24 of the Judicial Code, as amended, has jurisdiction of a suit against the United States for the recovery of internal revenue taxes in an amount in excess of $10,000, where the amount sought to be recovered as 1917 taxes results from a credit to the year 1917 of an overpayment for the year 1918.

2. Where the Commissioner credits an overpayment of taxes for the year 1918 against a barred deficiency for the year 1917, is such credit an overpayment for the year 1917 within the meaning of Sections 607 and 609 of the Revenue Act of 1928, especially where the facts of record show that the overpayment was barred unless timely claim for refund was filed, and there is no showing that such a claim was filed?

STATUTES AND COMMITTEE REPORTS INVOLVED

The statutes and committee reports involved will be found in the Appendix, *infra*, pp. 17–25.

STATEMENT

The case involves the attempted credit of an overpayment of taxes for the year 1918 against a barred deficiency for the year 1917.

The petition was filed in the District Court on May 24, 1930 (R. 1). In open court petitioner

stated that he relied upon the petition as setting out a case for refund of overpayment of tax for the period ended September 30, 1917 (R. 30).

The following facts were stipulated (R. 17–18):

Lowe Brothers Company is a corporation duly organized and existing under the laws of the State of Ohio, having its principal place of business in the City of Dayton, State of Ohio, and was incorporated in June, 1929.

Lowe Brothers Company (incorporated in 1893), predecessor of the petitioner, filed its income and profits tax return for its fiscal year ended September 30, 1917, on October 31, 1917, with the proper Collector of Internal Revenue and paid the tax shown to be due thereon; the predecessor of petitioner filed its income and excess profits tax return for the fiscal year ended September 30, 1918, on October 31, 1918, with the proper Collector of Internal Revenue and paid the tax shown to be due thereon.

On March 15, 1924, the Commissioner of Internal Revenue duly assessed against Lowe Brothers Company (incorporated in 1893) an additional income and profits tax for the fiscal year 1917, amounting to $31,771.71.

On March 15, 1924, the Commissioner of Internal Revenue signed a schedule of overassessments indicating that the petitioner's predecessor had overpaid its income and profits tax for the fiscal year ended September 30, 1918, in the amount of $52,710.03. Of said amount the Collector of Internal

Revenue, under instructions from the Commissioner, credited the sum of $11,230.14 against the deficiency assessment of $31,771.71 for the fiscal year ended September 30, 1917. The Collector of Internal Revenue applied the said credit on April 24, 1924, and the Commissioner approved said credit by signing Schedule IT R 9664 on May 10, 1924. (Exhibit A.)

On April 2, 1928, the petitioner's predecessor filed a claim for refund for $40,000 for its fiscal year ended September 30, 1917 (Exhibit B). On February 1, 1929, the Commissioner of Internal Revenue gave formal notice of rejection of said claim.

On January 25, 1923, and on February 9, 1923, respectively, the petitioner's predecessor filed income and profits tax waivers, approved by the Commissioner of Internal Revenue, for the fiscal year ended September 30, 1917. (Exhibits C and D respectively.)

The answer admitted that the Collector for the First District of Ohio in 1924 was not in office at the time this suit was filed (R. 3, 13).

The claim for refund of 1918 taxes was filed May 15, 1928 (R. 24), more than nine years from date of filing return and payment of tax due thereon (R. 17).

The District Court held that under Section 609 (a) of the Revenue Act of 1928, the alleged credit to the barred deficiency for 1917 was a nullity and therefore did not constitute an overpayment for

1917. Petitioner had indicated in open court that it relied upon the petition as setting out a case for refund of tax for 1917 (R. 30); hence, respondent's motion for judgment was sustained.

The Circuit Court of Appeals, following its earlier decisions, reversed the District Court on this issue, but held that the court was without jurisdiction of the suit against the United States on a claim in excess of $10,000.

SUMMARY OF ARGUMENT

The amount involved was in excess of $10,000. The District Court was without jurisdiction. The United States District Courts have jurisdiction of suits against the United States for amounts in excess of $10,000 only where suit would lie against a Collector who is dead or out of office. Here the amount sued for was not collected by the Collector for the year 1917, but by an alleged credit by the Commissioner. Suit would not lie against the Collector; hence, it does not come within the exceptions provided by Section 24 (20) of the Judicial Code (U. S. C., Title 28, Sec. 41).

Under Section 609 of the Revenue Act of 1928 the credit was void. The object of subsection 609 (a) was to protect the taxpayer, and the purpose of subsection 609 (b) to protect the Government from credits made after the bar of the statute of limitations. Here, the facts of record show not only that the 1917 deficiency was barred, but the same facts disclose that the 1918 overpayment was

barred unless timely claim for refund was filed. The failure to show the filing of such a claim is fatal to recovery.

The suit may not be sustained as one to recover the 1918 tax for any one of several reasons. In open court petitioner indicated that its suit was for recovery of an overpayment for 1917 tax. Petitioner admits the suit is not upon an account stated. The claim for refund of 1918 taxes was filed after the running of the statute.

ARGUMENT

I

THE DISTRICT COURT WAS WITHOUT JURISDICTION

The District Court had no jurisdiction of this suit against the United States to recover $11,230.14 (in excess of $10,000), allegedly credited against 1917 taxes because of an overpayment for 1918.

The District Courts have jurisdiction of suits against collectors regardless of the amount involved. *Elliott* v. *Swartwout,* 10 Pet. 137; *Arnson* v. *Murphy,* 109 U. S. 238; *Cary* v. *Curtis,* 3 How. 236. The Court of Claims has jurisdiction of suits against the United States without regard to the amount involved. Sec. 145 of the Judicial Code (U. S. C., Title 28, Sec. 250).

The Congress under the Tucker Act originally conferred upon the District Courts jurisdiction of suits against the United States of all claims not exceeding ten thousand dollars. Subsequent

amendments (c. 136, 42 Stat. 311 and c. 309, 43 Stat. 972), did not disturb the jurisdiction of the District Courts concurrent with the Court of Claims "of all claims not exceeding ten thousand dollars," but their jurisdiction was extended to include suits against the United States for the recovery of any internal revenue tax "even if the claim exceeds $10,000, if the *collector of internal revenue by whom such tax, penalty, or sum was collected* is dead or is not in office as collector of internal revenue at the time such suit or proceeding is commenced." [Italics supplied.] Sec. 24 (20) of the Judicial Code, *infra*, p. 17.

It is thus seen that the jurisdiction conferred upon the District Courts to hear and determine suits against the United States for the recovery of taxes in excess of $10,000 is as plainly limited under the statute by the requirement that the tax be collected by a collector of internal revenue, as it is by the requirement that the collector be dead or out of office. *Moses* v. *United States*, 61 F. (2d) 791 (C. C. A. 2d), certiorari denied, 289 U. S. 743; *United States* v. *Reeves Bros. Co.*, 83 F. (2d) 121 (C. C. A. 6th), certiorari denied, 299 U. S. 573; *Routzahn* v. *Reeves Bros. Co.*, 59 F. (2d) 915 (C. C. A. 6th), certiorari denied, 287 U. S. 650; *Gans Steamship Line* v. *United States*, 15 A. F. T. R. 826 (S. D. N. Y.), affirmed, 65 F. (2d) 1016 (C. C. A. 2d), certiorari denied, 290 U. S. 657; *Untermyer* v. *Bowers*, 7 F. Supp. 347 (S. D. N. Y.).

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The tax here was not collected by the Collector. If it became a part of the tax paid for 1917, it was because of the application thereto of monies already in the hands of the Treasury officials. It was the Commissioner's approval of the schedule on May 10, 1924, if anything, which collected the tax for 1917. In *United States* v. *Swift & Co.*, 282 U. S. 468, there had been a credit of an overpayment for year A against an unbarred deficiency for the year B. The question involved was the date which started the running of the statute of limitations against claim for refund for the year B. This Court said (pp. 473–474, 475–476):

> One of three dates may possibly be considered the date of the allowance of the credit—that on which the Commissioner forwarded the schedule of overassessments to the Collector, that on which the Collector finished his calculations and entered the amount of the credit in the taxpayer's account, or that on which the Commissioner approved the schedule of credits and refunds. * * *
>
> * * * * * *
>
> As the sole discretion and authority to allow a credit rests with the Commissioner, we think that, in the light of the procedure above outlined, his approval of the schedule of credits and refunds must be taken to be the final exercise of that discretion and the allowance of the credit. * * *

Thus the action of the Commissioner collected the tax. Cf. *Pottstown Co.* v. *United States*, 282

U. S. 479; *United States* v. *Boston Buick Co.*, 282 U. S. 476. Hence, this is not a suit which could be maintained against the Collector while in office. *Smietanka* v. *Indiana Steel Co.*, 257 U. S. 1; *Sage* v. *United States*, 250 U. S. 33.

As the statute specifically provides that the tax for the recovery of which the suit is brought must be collected by the Collector, the District Court had no jurisdiction to hear or determine this suit.

United States v. *Piedmont Mfg. Co.*, 89 F. (2d) 296 (C. C. A. 4th), holding to the contrary, we believe erroneously augments the jurisdiction of the District Courts. In reaching its decision the court relied largely upon its statement (p. 298): "No such distinction" as between collection and credit "was made in *Graham* v. *Goodcell*, 282 U. S. 409 * * *." But it must be remembered that this Court there decided several cases. The only case involving a credit of an overpayment for one year to a deficiency for another (*Boston Pressed Metal Co.* v. *United States*) was a suit originating in the Court of Claims and which involved less than $10,000. *United States* v. *Bertelsen & Petersen Engineering Co.*, decided March 18, 1938 (C. C. A. 1st), not yet officially reported, but found in 1938 C. C. H., Vol. 4, ¶9201, held that the suit there was to recover the overpayment of taxes for the year A (in which the collector collected the tax), not the year of the deficiency. Furthermore, rehearing upon the jurisdictional question only was granted April 14, 1938.

II

THE ATTEMPTED CREDIT WAS VOID; HENCE THE 1917 TAXES WERE NOT OVERPAID

Section 609 of the Revenue Act of 1928, c. 852, 45 Stat. 791 (U. S. C., Title 26, Sec. 1675), provides:

> (*a*) *Credit against barred deficiency.*—Any credit against a liability in respect of any taxable year shall be void if any payment in respect of such liability would be considered an overpayment under section 607.
>
> (*b*) *Credit of barred overpayment.*—A credit of an overpayment in respect of any tax shall be void if a refund of such overpayment would be considered erroneous under section 608.
>
> (*c*) *Application of section.*—The provisions of this section shall apply to any credit made before or after the enactment of this Act.

The facts of record disclose not only that the deficiency was barred, but that the credit or refund of the overpayment was barred.

Under Section 252 of the Revenue Act of 1921, *infra,* pp. 17–19, the overpayment for 1918 was barred unless claim for refund was filed within five years after the return was due; or unless the excess tax resulted from a decrease in invested capital due to the fact that taxpayer failed to take adequate deductions in previous years.

The 1918 return was filed October 31, 1918 (R. 17). The Commissioner approved the credit May 10, 1924 (R. 17–18). Hence, as petitioner admits (Br. 25), the overpayment was barred in the absence of a timely claim for refund. The filing of such a claim cannot be presumed. Petitioner may not attack the approval of May 10, 1924, and at the same time rely upon its presumptive correctness. Petitioner has not shown, and, we submit, cannot show that the determination of an overpayment for 1918 resulted from a claim for refund, and not from a claim in abatement. In such circumstances the credit was void under Section 609 (b).

As to whether the credit was void under Section 609 (a) the lower courts are in conflict. The Court of Claims holds that the word "void" used in the statute means void, and that where the collection of a deficiency would be an overpayment under Section 607, *infra,* the attempted credit is a nullity—hence taxes paid for year A are not by such a credit carried into year B. *Parks & Woolson Mach. Co.* v. *United States,* 58 F. (2d) 868, certiorari denied, 287 U. S. 634; *First Nat. Bank of Beaver Falls* v. *United States,* 8 F. Supp. 484, certiorari denied, 294 U. S. 717; *Leisenring* v. *United States,* 4 F. Supp. 993, certiorari denied, 291 U. S. 682; *Rosenstadt & Waller* v. *United States,* 7 F. Supp. 287. See also *U. S. Refractories Corp.* v. *Commissioner,* 23 B. T. A. 872.

Section 609 was enacted to do away with the uncertainty of the proper treatment of credits of barred overpayments and credits to barred deficiencies. The use of the word "void" seems deliberate. See H. Rep. No. 2, 70th Cong., 1st Sess., pp. 33, 34; and S. Rep. No. 960, 70th Cong., 1st Sess., pp. 41, 42, *infra,* pp. 21–25. Any other construction of Section 609 leaves it meaningless. Its related sections, 607, 609, 610 and 611, deal with collections and refunds. Section 607 and 611 use "overpayment" in referring to barred collections. Sections 608 and 610 use "erroneous" in referring to refunds. It would appear that Congress did not use like words in (a) and (b) of Section 609, because it intended such attempted credits to be a nullity. In fact, subdivision (a) of Section 609 provides the credit will be "void" if payment would be considered an "overpayment" under Section 607.

The Court of Claims holds that where a claim for refund is filed for the year of the overpayment, an attempted credit to a barred deficiency is a disallowance of that claim. *First Nat. Bank of Beaver Falls* v. *United States, supra.* This can probably be reconciled with the decision of this Court in *Bonwit Teller & Co.* v. *United States,* 283 U. S. 258, wherein it was held that the claim was disallowed, because in the latter case the certificate of overassessment was delivered to the taxpayer, upon which there arose an account stated forming the basis for the cause of action upon which the suit

was brought. See *United States* v. *Savings Bank,* 104 U. S. 728. Cf., *Daube* v. *United States,* 289 U. S. 367.

The Circuit Courts of Appeals for the Sixth Circuit and the Second Circuit hold that a credit against a barred deficiency is a collection of the deficiency by the Commissioner. *United States* v. *John Gallagher Co.,* 83 F. (2d) 368 (C. C. A. 6th); *Gans S. S. Line* v. *Bowers,* 82 F. (2d) 181, 183 (C. C. A. 2d).

United States v. *Piedmont Mfg. Co.,* 89 F. (2d) 296 (C. C. A. 4th), and *United States* v. *Bertelsen & Petersen Engineering Co., supra,* did not involve credits to *barred* deficiencies. Furthermore, in the latter case the court said (p. 9697):

> * * * we think in the last analysis it is based on a claim for a balance of the overpayment for the 1917 tax and not for an illegal collection of a 1918 tax [the year of the deficiency]. The District Court so held. * * *

The decisions holding that a credit to a barred deficiency is a collection by the Commissioner of the barred deficiency rely upon the decisions of this Court in *Graham & Foster* v. *Goodcell* and *Boston Pressed Metal Co.* v. *United States,* 282 U. S. 409, 424; and *Stearns Co.* v. *United States,* 291 U. S. 54. However, in both of these cases this Court held on the facts that the credit would not have been an overpayment under Section 607; hence, Section 609 did not apply.

III

THE SUIT MAY NOT BE SUSTAINED AS ONE TO RECOVER THE 1918 TAX

The District Court stated (R. 30):

> Some question having been raised as to the nature of plaintiff's action, it was indicated in open court at the time of trial that plaintiff relied upon the petition as setting out a case for refund of overpayment of tax for the period ended September 30, 1917. * * *

Certainly at this date petitioner may not be allowed to change his front.

Furthermore, a claim for refund is a condition precedent to suit. *United States* v. *Felt & Tarrant Co.*, 283 U. S. 269. The only claim for refund for 1918 was filed May 15, 1928 (R. 24). The claim was not timely. Revised Statutes, Secs. 3226, 3228, as amended by Sections 1112 and 1113 of the Revenue Act of 1926. Return was filed on October 31, 1918, and the tax shown due thereon was then paid. (R. 17.)

In addition, there is no showing of the date the certificate of overassessment was delivered to petitioner. The record does show that the balance shown thereon was paid May 2, 1924. (R. 25.) The Commissioner approved the schedule May 10, 1924. Suit was instituted May 24, 1930, more than six years after signing of the schedule. Hence, there is no showing that the suit was timely, even if based upon a delivery of the certificate sufficient to

constitute an account stated such that the six year limitation would apply. See *Bonwit Teller & Co.* v. *United States, supra.* Nor in such case would the District Court have jurisdiction on such a theory, as the amount is in excess of $10,000.

On no theory may petitioner sustain the suit as one for 1918 taxes.

IV

THERE WAS AN ACCOUNT SETTLED WHICH BARS RECOVERY

Exhibit A to the stipulation (R. 20) shows credits on May 10, 1924, to the years 1916, 1921, and 1922, as well as to the year 1917, and an abatement of taxes for 1918. The balance of the deficiency was paid May 2, 1924. (R. 25.) Petitioner accepted these credits, paid the balance due and made no objection thereto until nearly four years thereafter—April 2, 1928. The situation is no different from that in *Stearns Co.* v. *United States,* 291 U. S. 54. This Court's statement paraphrases the facts in the instant case (p. 66):

> The taxpayer did not object to the account as submitted in its final form. Far from objecting, it paid the resulting balance, and by this act as well as silence conceded the indebtedness. Indeed, there was more than an account stated; by force of voluntary payment there was also an account settled.

See also *First Nat. Bank of Beaver Falls* v. *United States, supra.*

CONCLUSION

The District Court was without jurisdiction. Recovery is barred as there was an account settled. The attempted credit was void. Upon the facts no recovery may be had for 1918 taxes. The decision should be affirmed.

Respectfully submitted.

ROBERT H. JACKSON,
Solicitor General.
JAMES W. MORRIS,
Assistant Attorney General.
SEWALL KEY,
A. F. PRESCOTT,
Special Assistants to the Attorney General.

APRIL 1938.

APPENDIX

Judicial Code, as amended:

SEC. 24. The district courts shall have original jurisdiction as follows:

* * * * *

Twentieth. Concurrent with the Court of Claims, of all claims not exceeding ten thousand dollars founded upon the Constitution of the United States or any law of Congress, * * * and of any suit or proceeding commenced after the passage of the Revenue Act of 1921, for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws even if the claim exceeds $10,000, if the collector of internal revenue by whom such tax, penalty, or sum was collected is dead or is not in office as collector of internal revenue at the time such suit or proceeding is commenced. * * * All suits brought and tried under the provisions of this paragraph shall be tried by the court without a jury. (U. S. C., Title 28, Sec. 41.)

Revenue Act of 1921, c. 136, 42 Stat. 227:

SEC. 252. That if, upon examination of any return of income made pursuant to this Act, the Act of August 5, 1909, entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," the Act of October 3, 1913, entitled "An Act to reduce

tariff duties and to provide revenue for the Government, and for other purposes," the Revenue Act of 1916, as amended, the Revenue Act of 1917, or the Revenue Act of 1918, it appears that an amount of income, war-profits or excess-profits tax has been paid in excess of that properly due, then, notwithstanding the provisions of section 3228 of the Revised Statutes, the amount of the excess shall be credited against any income, war-profits or excess-profits taxes, or installment thereof, then due from the taxpayer under any other return, and any balance of such excess shall be immediately refunded to the taxpayer: *Provided,* That no such credit or refund shall be allowed or made after five years from the date when the return was due, unless before the expiration of such five years a claim therefor is filed by the taxpayer: *Provided further,* That if upon examination of any return of income made pursuant to the Revenue Act of 1917, the Revenue Act of 1918, or this Act, the invested capital of a taxpayer is decreased by the Commissioner, and such decrease is due to the fact that the taxpayer failed to take adequate deductions in previous years, with the result that an amount of income tax in excess of that properly due was paid in any previous year or years, then, notwithstanding any other provision of law and regardless of the expiration of such five-year period, the amount of such excess shall, without the filing of any claim therefor, be credited or refunded as provided in this section: *And provided further,* That nothing in this section shall be construed to bar from allowance claims for refund filed prior to the passage of the Revenue Act of 1918 under subdivision (a) of section 14 of the Revenue Act of 1916, or filed prior to the

passage of this Act under section 252 of the Revenue Act of 1918.

Revenue Act of 1928, c. 852, 45 Stat. 791:

SEC. 607. EFFECT OF EXPIRATION OF PERIOD OF LIMITATION AGAINST UNITED STATES.

Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this Act) after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim. (U. S. C., Title 26, Sec. 1670.)

SEC. 608. EFFECT OF EXPIRATION OF PERIOD OF LIMITATION AGAINST TAXPAYER.

A refund of any portion of an internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) made after the enactment of this Act, shall be considered erroneous—

(a) if made after the expiration of the period of limitation for filing claim therefor, unless within such period claim was filed; or

(b) in the case of a claim filed within the proper time and disallowed by the Commissioner after the enactment of this Act, if the refund was made after the expiration of the period of limitation for filing suit, unless—

(1) within such period suit was begun by the taxpayer, or

(2) within such period, the taxpayer and the Commissioner agreed in writing to suspend the running of the statute of limitations for filing suit from the date of the agreement to the date of final decision in one or more named cases then pending before the United States Board of Tax Appeals or the courts. (U. S. C., Title 26, Sec. 1674.)

SEC. 609. ERRONEOUS CREDITS.

(a) *Credit against barred deficiency.*—Any credit against a liability in respect of any taxable year shall be void if any payment in respect of such liability would be considered an overpayment under section 607. (U. S. C., Title 26, Sec. 1675.)

(b) *Credit of barred overpayment.*—A credit of an overpayment in respect of any tax shall be void if a refund of such overpayment would be considered erroneous under section 608. (U. S. C., Title 26, Sec. 1675.)

(c) *Application of section.*—The provisions of this section shall apply to any credit made before or after the enactment of this Act. (U. S. C., Title 26, Sec. 1675.)

SEC. 610. RECOVERY OF AMOUNT ERRONEOUSLY REFUNDED.

(a) Any portion of an internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) refund of which is erroneously made, within the meaning of section 608, after the enactment of this Act, may be recovered by suit brought in the name of the United States, but only if such suit is begun within two years after the making of such refund.

(b) Any portion of an internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) which has been erroneously refunded (if such refund would not be considered as erroneous under section 608) may be recovered by suit brought in the name of the United States, but only if such suit is begun before the expiration of two years after the making of such refund or before May 1, 1928, whichever date is later. (U. S. C., Title 26, Sec. 1646.)

SEC. 611. COLLECTIONS STAYED BY CLAIM IN ABATEMENT.

If any internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) was, within the period of limitation properly applicable thereto, assessed prior to June 2, 1924, and if a claim in abatement was filed, with or without bond, and if the collection of any part thereof was stayed, then the payment of such part (made before or within one year after the enactment of this Act) shall not be considered as an overpayment under the provisions of section 607, relating to payments made after the expiration of the period of limitation on assessment and collection.

H. Rep. No. 2, 70th Cong., 1st Sess., pp. 33–34:

SEC. 607. EFFECT OF EXPIRATION OF PERIOD OF LIMITATION AGAINST UNITED STATES.

Section 1106 (a) of the 1926 Act failed to resolve many doubtful questions as to the legal effect which follows the expiration of the period of limitations prescribed for the assessment or collection of a tax or for the making of a refund or credit or the bringing of a suit for refund. Section 1106 (a) of the 1926 Act is repealed as of its effective date and is replaced by sections 607, 608, 609, and 610 of this bill.

Section 607 of the bill prescribes the effect to be given to the expiration of a period of limitations against the United States and section 608 relates to the effect of the expiration of limitations periods against the taxpayer.

Section 607 provides that regardless of the correct tax liability any payment shall be an overpayment if made after the period of limitation on assessment (no assessment hav-

ing been made within such period) or after the expiration of the period of limitation on collection by distraint or court proceedings (no distraint or court proceedings having been begun within such period). An overpayment under section 607 is to be credited or refunded the same as any other overpayment.

Section 607 is applicable to payments made before or after the enactment of this Act. Any such overpayment shall be credited or refunded, however, only if claim therefore is filed within the proper period of limitation.

Neither section 607 nor section 608 applies to payments pursuant to a final decision of the Board of Tax Appeals or of a court, whether or not the question as to the statute of limitations was raised in the proceeding. The decision is final and under no circumstances could a payment pursuant to it be considered erroneous. Obviously, also, neither section applies to cases which have been closed by a final agreement under section 1106 (b) of the 1926 Act or section 606 of the new Bill.

SEC. 608. EFFECT OF EXPIRATION OF PERIOD OF LIMITATIONS AGAINST THE TAXPAYER.

If a refund is made after the expiration of the period for filing claim (claim not having been filed within the period) or after the rejection, after the date of the enactment of this Act, of a claim filed within the proper period and if the period for filing suit has expired (no suit having been filed within the period), the refund thus made shall be considered as erroneous and is recoverable by the United States as provided in section 610.

SEC. 609. ERRONEOUS CREDITS.

Section 609 provides that a credit of an overpayment against a barred deficiency or

a credit of a barred overpayment against a deficiency which is not barred, shall be void if payment of the deficiency in the first case or the making of a refund in the second would constitute an overpayment or an erroneous refund under section 607 or 608. In other words, the credit is void if either the deficiency or the overpayment is barred.

Section 609 applies to any credit made before or after the enactment of this Act.

S. Rep. No. 960, 70th Cong., 1st Sess., pp. 41–42:

SEC. 607. EFFECT OF EXPIRATION OF PERIOD OF LIMITATION AGAINST UNITED STATES.

Section 1106 (a) of the 1926 act failed to resolve many doubtful questions as to the legal effect which follows the expiration of the period of limitation prescribed for the assessment or collection of a tax or for the making of a refund or credit or the bringing of a suit for refund. Section 1106 (a) of the 1926 act is repealed as of its effective date and is replaced by sections 607, 608, 609, and 610 of this bill.

Section 607 of the bill prescribes the effect to be given to the expiration of a period of limitation against the United States and section 608 relates to the effect of the expiration of a period of limitation against the taxpayer.

Section 607 provides that regardless of the correct tax liability any payment shall be an overpayment if made pursuant to an assessment after the expiration of the period of limitation on assessment (no assessment having been made within such period) or after the expiration of the period of limitation on collection by distraint or court proceedings (no distraint or court proceeding having been begun within such period). It

is immaterial whether the payment was voluntary or involuntary, and duress is also of no significance in determining the right to recover an amount paid after the statute has run. An overpayment under section 607 is to be credited or refunded the same as any other overpayment.

Section 607 is applicable to payments made before or after the enactment of this act. Any such overpayment shall be credited or refunded, however, only if claim therefor is filed within the proper period of limitation.

The section has been rewritten by a committee amendment in somewhat simpler language.

Neither section 607 nor section 608 applies to payments pursuant to a final decision of the Board of Tax Appeals or of a court, whether or not the question as to the statute of limitations was raised in the proceeding. The decision is final and under no circumstances could a payment pursuant to it be considered erroneous. Obviously, also, neither section applies to cases which have been closed by a final agreement under section 1106 (b) of the 1926 act or section 606 of the new bill.

SEC. 608. EFFECT OF EXPIRATION OF PERIOD OF LIMITATION AGAINST THE TAXPAYER.

If a refund is made after the expiration of the period for filing claim (claim not having been filed within the period) or after the rejection, after the date of the enactment of this act, of a claim filed within the proper period, and if the period for filing suit has expired (no suit having been filed within the period), the refund thus made shall be considered as erroneous and is recoverable by the United States as provided in section 610.

It seems desirable to provide some means

whereby, in connection with questions of broad application to a great number of cases, one test suit may be brought and all the other cases involving the same point may be held in abeyance until the test suit is decided. Accordingly, the committee proposes to amend the House bill by inserting in section 608 a provision to the effect that in cases of the kind described the commissioner and the taxpayer may execute an agreement suspending the running of the statute of limitations for filing suit until final decision in the test case or cases named in the agreement. This amendment will prevent a multiplicity of suits without disturbing in any way the desirable policy embodied in the provisions of the House bill. It will be noted that the agreement is not that the parties thereto shall be bound by the test case in the settlement of the tax liability.

SEC. 609. ERRONEOUS CREDITS.

Section 609 provides that a credit of an overpayment against a barred deficiency or a credit of a barred overpayment against a deficiency which is not barred shall be void if payment of the deficiency in the first case or the making of a refund in the second would constitute an overpayment or an erroneous refund under section 607 or 608.

Section 609 applies to any credit made before or after the enactment of this act.

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SUPREME COURT OF THE UNITED STATES.

No. 864.—October Term, 1937.

Lowe Brothers Company, Petitioner, vs. United States. | On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[May 16, 1938.]

Mr. Justice Stone delivered the opinion of the Court.

The question for decision is whether the district courts of the United States have jurisdiction, under § 24(20) of the Judicial Code, of a suit brought against the United States to recover income and excess profits taxes in an amount in excess of $10,000 when the recovery sought is of an overpayment of taxes for one year, effected by crediting against a barred deficiency for that year an overpayment for another year.

Petitioner[1] overpaid income and excess profits taxes for 1918. The commissioner, on May 15, 1924, signed a schedule of overpayments by which he approved a credit as of April 24, 1924 of a part of the 1918 overpayment, in an amount exceeding $10,000, against a tax deficiency of petitioner for 1917, the collection of which was then barred by the statute of limitations. The collector in office in 1924, when the credit was allowed, having retired, petitioner brought the present suit against the United States, in the district court for southern Ohio, to recover the amount of the credit. The petition alleges overpayment of the 1917 tax by reason of the credit, and demands its recovery. Petitioner has neither alleged nor proved any claim for refund of the 1918 overpayment, recovery of which, without such claim, was barred by limitation.

The trial court, construing the suit as one to recover an overpayment of 1917 taxes, as petitioner conceded in open court, gave judgment dismissing the petition on the ground that the credit of the 1918 overpayment upon the barred deficiency for 1917 was not

[1] As petitioner stands in the place of its corporate predecessor by virtue of a merger, and as their rights and interests in the present suit may be treated as identical, both will be referred to as "petitioner".

a payment of the 1917 tax since the credit is "void" under the applicable sections, 607 and 609, of the Revenue Act of 1928. The Court of Appeals for the Sixth Circuit affirmed on a different ground, holding that the district court was without jurisdiction, under the provisions of § 24(20) of the Judicial Code, 28 U. S. C. § 41(20), which confers jurisdiction on the district court of suits against the United States to recover taxes erroneously assessed or collected in excess of $10,000, only if the collector by whom the tax was collected is dead or is not in office when the suit is brought. 92 F. (2d) 905. We granted certiorari, — U. S. —, upon a petition presenting the single question of the jurisdiction of the district court, in order to resolve an asserted conflict between the decision below and that of the Court of Appeals for the Fourth Circuit in *United States* v. *Piedmont Mfg. Co.*, 89 F. (2d) 296.

The Court of Appeals, following *United States* v. *Piedmont Manufacturing Co., supra,* and its own decision in *United States* v. *John Gallagher Co.*, 83 F. (2d) 368, thought that the credit of the 1918 overpayment of the 1917 tax was not void, but voidable only at the election of the taxpayer and was consequently an overpayment of 1917 taxes for which recovery might be had in a court having jurisdiction. But following its own decision in *United States* v. *Reeves Bros. Co.*, 83 F. (2d) 121, and that of the Court of Appeals for the Second Circuit in *Moses* v. *United States,* 61 F. (2d) 791, it held that the district court was without jurisdiction because the collection of the 1917 tax, effected by the allowance of the credit, was not made by a collector and thus did not satisfy the jurisdictional requirement.

The Court of Claims has jurisdiction of suits against the United States brought to recover internal revenue taxes erroneously collected without regard to the amount involved. § 145 J. C., 28 U. S. C. § 250. Before the amendment of 1921, c. 136, 42 Stat. 311 (continued by Revenue Act of 1924, 44 Stat. 121), § 24(20) of the Judicial Code gave jurisdiction to the district courts, concurrent with the Court of Claims, of suits against the United States to recover "claims not exceeding ten thousand dollars founded upon . . . any law of Congress . . . or upon any contract, express or implied, with the Government of the United States . . ." C. 231, 36 Stat. 1093. Both before and after the amendment, district courts also had jurisdiction of suits against a collector of internal revenue brought to recover, in any amount, internal rev-

(, and , so far as now material, in the Revenue Act of 1926, 44 Stat. 121

enue taxes which he had erroneously collected. § 24(5) J. C., 28 U. S. C. § 41(5). Such suits brought against the collector survive his retirement from office and do not abate upon his death. *Patton* v. *Bradley,* 184 U. S. 608; *Smietanka* v. *Indiana Steel Co.,* 257 U. S. 1; *Union Trust Co.* v. *Wardell,* 258 U. S. 537.

By the amendment of § 24(20) the jurisdiction of district courts was extended so as to embrace suits against the United States to recover taxes "even if the claim exceeds $10,000, if the collector of internal revenue by whom such tax . . . was collected is dead or is not in office as collector of internal revenue at the time such suit or proceeding is commenced". Since the suit allowed against the collector before the amendment was based on his personal liability, *Sage* v. *United States,* 250 U. S. 33; *Smietanka* v. *Indiana Steel Co., supra,* no such suit will lie unless he has collected the tax. The obvious purpose of the amendment was to permit a substitution of a suit against the United States for the suit previously allowed against the collector whenever the amount claimed exceeds $10,000 and the collector is out of office. This is made evident by the words of the amendment which authorize the substitution only when the collection is made by the collector when in office.

As we think it plain that no suit could have been maintained against the collector to recover the alleged overpayment, it follows that the district court was without jurisdiction to entertain the present suit. If the 1917 tax can be said to have been collected at all, as to which we express no opinion, it was collected by the action of the commissioner in crediting against the 1917 deficiency the 1918 overpayment. In 1924, the year of the claimed overpayment, the collector received no overpayment of petitioner's tax for any year. If the 1917 taxes were then collected it was by virtue of the application to the 1917 deficiency of moneys already in the treasury. The collector was without authority to make such application. It was the commissioner's approval of the schedule of overpayments which was effective for that purpose. *Girard Trust Co.* v. *United States,* 270 U. S. 163, 170, 171; *United States* v. *Swift & Co.,* 282 U. S. 468. The certification of the overpayment by the collector to the commissioner, a mere ministerial act, could subject the collector to no personal liability.

It is true that under the statutes of the United States the collector is relieved from personal liability except in the case where

the district court is of opinion that he acted without probable cause, *Sage* v. *United States, supra,* 37, and that such suits against the collector are commonly but a means of collecting the overpayment from the United States. *Moore Ice Cream Co.* v. *Rose,* 289 U. S. 373, 382. But no statute has enlarged the collector's common law liability to suit, and we cannot ignore the words of the amendment of § 24(20) which, in providing for a suit against the United States in lieu of one against the collector, make collection by him the *sine qua non* of jurisdiction.

Graham & Foster v. *Goodcell,* 282 U. S. 409, did not deal with the point here considered. The only one of the several cases decided there involving a credit of an overpayment for one year against a deficiency for another, *Boston Pressed Metal Co.* v. *United States,* was a suit brought in the Court of Claims for less than $10,000.

Affirmed.

Mr. Justice CARDOZO took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.